Texas Department of Motor Vehicles

HELPING TEXANS GO. HELPING TEXAS GROW.

TxDMV Board Meeting

9:00 a.m.
Thursday, April 13, 2023

AGENDA
BOARD MEETING
TEXAS DEPARTMENT OF MOTOR VEHICLES
4000 JACKSON AVE., BUILDING 1, LONE STAR ROOM
AUSTIN, TEXAS 78731
THURSDAY, APRIL 13, 2023
9:00 A.M.

Link to April 13, 2023, TxDMV Board Meeting Documents:
https://www.txdmv.gov/about-us/txdmv-board-meetings

All agenda items are subject to possible discussion, questions, consideration, and action by the Board of the Texas Department of Motor Vehicles (Board). Agenda item numbers are assigned for ease of reference only and do not necessarily reflect the order of their consideration by the Board. Presentations may be made by the identified staff, Board member, or other personnel as needed. The Board reserves the right to discuss any items in closed session where authorized by the Open Meetings Act.

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1. Roll Call and Establishment of Quorum

2. Pledges of Allegiance - U.S. and Texas

3. Chair's Reports - Chairman Bacarisse
- A. Chair's Annual Report to Governor on State of Affairs - Fiscal Year 2022
- B. Recognition of Service - Manuel "Manny" Ramirez

4. Executive Director's Reports - Daniel Avitia

5 A. Introduction of General Counsel - Laura Moriaty

6 B. 2023 American Association of Motor Vehicle Administrators (AAMVA) Workshop & Law Institute

7 C. Awards, Recognition of Years of Service, and Announcements

CONTESTED CASE

8 **5. Proposal for Decision: Franchised Dealer's Protest of Notice of Termination of Franchise; SOAH Docket No. 608-21-0988; Texas Department of Motor Vehicles Docket No. 21-0004-LIC;** *McAllen Jeep, Inc. d/b/a Bert Ogden Subaru, Petitioner v. Subaru of America, Inc., Respondent* - Rob Blech (ACTION ITEM)

RULE ADOPTION

287 **6. Chapter 206. Management** - David Richards (ACTION ITEM)
Amendments, §§206.94 - 206.97
Repeal, §206.98
(Relating to Advisory Committees)
(Published 12/23/22 - 47 TexReg 8520)

BRIEFING AND ACTION ITEMS

294 **7.** Specialty Plate Design - Patricia Ueckert (ACTION ITEM)
Sam Houston State University - Crossover Design Proposed by License Plates of Texas under Transportation Code §504.6011 and §504.851

297 **8.** 88th Legislative Session Update - Keith Yawn (BRIEFING ONLY)

9. Finance and Audit

298 A. Semi-Annual FY 2023 Financial Report - Glenna Bowman and John Ralston (BRIEFING ONLY)

312 B. Internal Audit Division Status Update: Internal and External Engagements - Salem Chuah (BRIEFING ONLY)

CLOSED SESSION

10. The Board may enter into closed session under one or more of the following provisions of the Texas Open Meetings Act, Government Code Chapter 551, including briefing, discussion, and deliberation regarding Temporary tags:

Section 551.071 - Consultation with and advice from legal counsel regarding:
- pending or contemplated litigation, or a settlement offer;
- a matter in which the duty of the attorney to the government body under the Texas Disciplinary Rules of Professional Conduct of the State Bar of Texas clearly conflicts with Government Code Chapter 551;
- any item on this agenda; or
- *Lucid Group USA, Inc. vs. Monique Johnston, in her official capacity as Director of the Motor Vehicle Division of the Texas Department of Motor Vehicles, et al.*; Case No. 1:22-cv-01116; in the United States District Court for the Western District of Texas, Austin Division; or

Section 551.074 - Personnel matters.
- Discussion relating to the appointment, employment, evaluation, reassignment, duties, discipline, and dismissal of personnel.
- Performance evaluation of Internal Auditor, including any modifications to compensation.

Section 551.076 - Deliberation Regarding Security Devices or Security Audits.
- the deployment, or specific occasions for implementation, of security personnel or devices; or
- a security audit.

Section 551.089 - Deliberation Regarding Security Devices or Security Audits.
- security assessments or deployments relating to information resources technology;

- network security information as described by Government Code Section 2059.055(b); or
- the deployment, or specific occasions for implementation, of security personnel, critical infrastructure, or security devices.

11. Action Item from Closed Session
Performance evaluation of Internal Auditor, including any modifications to compensation

12. Public Comment

13. Adjournment

The Board will allow an open comment period to receive public comment on any agenda item or other matter that is under the jurisdiction of the Board. No action will be taken on matters that are not part of the agenda for the meeting. For subjects that are not otherwise part of the agenda for the meeting, Board members may respond in accordance with Government Code §551.042 and consider the feasibility of placing the matter on the agenda for a future meeting.

If you would like to comment on any agenda item (including an open comment under the agenda item for Public Comment), you must complete a speaker's form at the registration table prior to the agenda item being taken up by the Board or send an email to *GCO_General@txdmv.gov* to register by providing the required information prior to the agenda item being taken up by the Board:

1. a completed Public Comment Registration Form; or
2. the following information:
   a. the agenda item you wish to comment on;
   b. your name;
   c. your address (optional), including your city, state, and zip code; and
   d. who you are representing.

Public comment will only be accepted in person. Each speaker will be limited to three minutes, and time allotted to one speaker may not be reassigned to another speaker.

Any individual with a disability who plans to attend this meeting and requires auxiliary aids or services should notify the department as far in advance as possible, but no less than two days in advance, so that appropriate arrangements can be made. Contact David Richards by telephone at (512) 465-1423.

I certify that I have reviewed this document and that it conforms to all applicable Texas Register filing requirements.

CERTIFYING OFFICIAL: Laura Moriaty, General Counsel, (512) 465-5665.

Texas Department of Motor Vehicles
HELPING TEXANS GO. HELPING TEXAS GROW.

Board Meeting Date: 4/13/2023
BRIEFING ITEM

To: Texas Department of Motor Vehicles Board
From: Daniel Avitia, Executive Director
Agenda Item: 4.A
Subject: Executive Director's Report - Introduction of General Counsel - Laura Moriaty

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RECOMMENDATION

Briefing Only.

PURPOSE AND EXECUTIVE SUMMARY

Laura Moriaty joined the Texas Department of Motor Vehicles (TxDMV) on March 6, 2023, and serves as the General Counsel . In this role, Laura advises the department's executive team and Board on a range of legal matters and manages the work of the Office of General Counsel.

Laura Moriaty has spent the last 12 years of her career specializing in Texas administrative law, representing Texas state agencies. She has served in a General Counsel role for the Texas Board of Veterinary Medical Examiners and the State Board for Educator Certification, and as an Administrative Law Judge for the Texas Education Agency. Prior to entering state service, Laura was a securities litigator for national law firms Akin Gump and Greenberg Traurig.

Laura was born and raised in Austin. She attended college at Yale University and law school at the University of Virginia.

FINANCIAL IMPACT

N/A

BACKGROUND AND DISCUSSION

N/A

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Texas Department of Motor Vehicles
HELPING TEXANS GO. HELPING TEXAS GROW.

Board Meeting Date: 4/13/2023
BRIEFING ITEM

To: Texas Department of Motor Vehicles Board
From: Daniel Avitia, Executive Director
Agenda Item: 4.B
Subject: Executive Director's Reports - American Association of Motor Vehicle Administrators (AAMVA) 2023 Workshop & Law Institute

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RECOMMENDATION

Briefing Only.

PURPOSE AND EXECUTIVE SUMMARY

Executive Director Daniel Avitia, Deputy Executive Director Shelly Mellott, and Deputy Executive Director Roland D. Luna, Sr., and staff from across the department attended the American Association of Motor Vehicle Administrators (AAMVA) 2023 Workshop & Law Institute Conference in San Antonio, Texas March 2023.

FINANCIAL IMPACT

None

BACKGROUND AND DISCUSSION

The AAMVA Workshop and Law Institute offered a collaborative environment to network and learn from fellow motor vehicle and law enforcement colleagues from fellow jurisdictions and meet with industry organizations. The two-day conference was packed with sessions covering hot topics in the motor vehicle and law enforcement community, including customer communications, insurance verification, license plate standards.

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Texas Department of Motor Vehicles
HELPING TEXANS GO. HELPING TEXAS GROW.

Board Meeting Date: 4/13/2023
BRIEFING ITEM

To: Texas Department of Motor Vehicles Board
From: Daniel Avitia, Executive Director
Agenda Item: 4.C
Subject: Executive Director's Report – Awards, Recognition of Years of Service, and Announcements

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RECOMMENDATION

Briefing Only. Board Chair and members offer congratulations to employees receiving recognition for an award, reaching a state service milestone, or retirement.

PURPOSE AND EXECUTIVE SUMMARY

The Executive Director announces the name of individuals who retired from the agency and recognizes employees who have reached a state service milestone of 20 years and every five-year increment thereafter. Recognition at the April 13, 2023, Board Meeting for state service awards and retirements include:

- David Pyndus – Vehicles Titles and Registration Division, reached 20 years of state service.
- John Schrier – Enforcement Division, reached 20 years of state service.
- Claudette Otis-Watkins – Motor Carrier Division, reached 25 years of state service.
- DuWayne Murdock Jr – Motor Carrier Division, reached 35 years of state service.
- Bennie Brown – Office of Administrative Hearings, reached 25 years of state service.
- Vanessa Williams – Motor Carrier Division, reached 25 years of state service.

The following individuals recently retired from the agency:

- Judith (Judy) Baxter – Vehicle Titles and Registration Division, reached 22 years of state service.
- Dawn Burton – Office of General Counsel Division , reached 23 years of state service.
- Lee Gradney – Motor Carrier Division, reached 24 years of state service.
- Tracey Stafford – Enforcement Division, reached 21 years of state service.

FINANCIAL IMPACT

No financial impact.

BACKGROUND AND DISCUSSION

No additional background and discussion.

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Texas Department of Motor Vehicles
HELPING TEXANS GO. HELPING TEXAS GROW.

Board Meeting Date: 4/13/2023
ACTION ITEM

To: Texas Department of Motor Vehicles Board
From: Laura Moriaty, General Counsel
Agenda Item: 5
Subject: **Proposal for Decision: Franchised Dealer's Protest of Notice of Termination of Franchise; SOAH Docket No. 608-21-0988; Texas Department of Motor Vehicles Docket No. 21-0004-LIC;** *McAllen Jeep, Inc. d/b/a Bert Ogden Subaru, Petitioner v. Subaru of America Inc., Respondent*

RECOMMENDATION

This contested case is between two license holders. Department staff are prohibited from making a recommendation in this case because the department is not a party to the case.

PURPOSE AND EXECUTIVE SUMMARY

The State Office of Administrative Hearings (SOAH) issued a Proposal for Decision (PFD). The Board is required to issue a final order in this case.

This contested case involves McAllen Jeep, Inc. d/b/a/ Bert Ogden Subaru's (Bert Ogden) protest of the proposed termination of the franchise by Subaru of America, Inc. (Subaru), a distributor.

The issue presented before the Board is whether Subaru established—by a preponderance of the evidence[1] — good cause for termination of its franchise with Bert Ogden, as required in TEX. OCC. CODE §2301.453(g).

This matter was presented to the Board at the February 9, 2023, Board meeting. Both parties made presentations and answered questions from Board members. No motions were made regarding adoption of the PFD and the Board approved a motion to postpone action on the agenda item until the next Board meeting.

Both parties timely provided notice of their intent to make oral presentation and submitted written materials.

FINANCIAL IMPACT

No significant financial impact to TxDMV.

BACKGROUND AND DISCUSSION

On August 20, 2020, Subaru notified Bert Ogden of its intent to terminate the franchise. The department's Motor Vehicle Division referred this contested case to SOAH on January 8, 2021, and on January 14, 2021, the department issued a Notice of Hearing. A panel of two administrative law judges (ALJs) conducted the hearing on the merits on January 18-21, 24-28, and 31, 2022.

[1] Tex. Occ. Code §2301.453(g) requires the Board to determine whether the party seeking the termination has established by a preponderance of the evidence that there is good cause for the proposed termination. Black's Law Dictionary (11th ed. 2019) defines "preponderance of the evidence" to mean the greater weight of the evidence, not necessarily established by the greater number of witnesses testifying to a fact but by evidence that has the most convincing force; superior evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other. This is the burden of proof in most civil trials, in which the jury is instructed to find for the party that, on the whole, has the stronger evidence, however slight the edge may be.

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The ALJs closed the record of the administrative hearing on May 20, 2022, after post-hearing briefs were filed, and issued the PFD on July 19, 2022. The ALJs found that Subaru met its burden to show good cause for the termination and recommended the Board deny Bert Ogden's protest of the termination.

On August 3, 2022, Bert Ogden filed Exceptions to the PFD, and on August 18, 2022, Subaru filed a Reply to Bert Ogden's Exceptions to the PFD. The ALJs considered the Exceptions and the Reply and issued their Exceptions Letter on October 17, 2022. The ALJs' Exceptions Letter did not recommend any changes to the PFD and stated that the PFD was ready for consideration by the Board.

The Board has jurisdiction to consider the contested case and enter a final order. In determining whether Subaru established good cause for the termination, Texas law requires the Board to consider:

1) seven specific statutory factors,

2) all existing circumstances, and

3) whether the termination is based solely on the desire for market penetration.[2]

The ALJ's analysis of the statutory factors under TEX. OCC. CODE §2301.455 are summarized in the following chart:

Summary of ALJs' Analysis	
Factor	**Evidence in Favor of:**
Factor 1: Dealer's Sales in Relation to the Sales in the Market – PFD pp. 17-41, 87-89 • Bert Ogden has consistently been the lowest-performing dealer in its zone, achieving an average minimum sales responsibility (MSR) of 41.3% for the period 2016-2020; 100% is considered average. • Bert Ogden's lower sales than the rest of the district or zone were not the result of Subaru's inventory allocation. • Bert Ogden's sales in relation to the market supports termination.	Termination/Subaru
Factor 2: Dealer's Investment and Obligations – PFD pp. 41-46, 89-90 • Bert Ogden itself did not invest much in the dealership, so its investments would not be greatly harmed by termination. • This factor does not weigh in favor of or against termination.	Neither Party
Factor 3: Injury or Benefit to the Public – PFD pp. 46-54, 90-91 • Ranked against other dealers in the Dallas-based zone (DFW Zone), Burt Ogden placed at or near the bottom in purchase satisfaction scores from 2017-2021. • Bert Ogden also ranked below the DFW Zone in service satisfaction for most of 2019, all of 2020 and most of 2021.	Termination/Subaru

[2] Tex. Occ. Code §2301.453 and §2301.455.

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Summary of ALJs' Analysis	
Factor	**Evidence in Favor of:**
• There is little public benefit to continuing Bert Ogden's dealership agreement considering the dealership's consistently low purchase and service satisfaction rankings. • The possible inconvenience to customers during the transition to a new dealer, and the lack of benefit of leaving Bert Ogden's dealership agreement in place, is outweighed by the benefit to the public of a new Subaru dealer. • This factor weighs in favor of termination.	
Factor 4: Adequacy of the Dealer's Service Facilities, Equipment, Parts, and Personnel in Relation to Those of Other Dealers of New Motor Vehicles of the Same Line-Make – PFD pp. 54-63, 91-92 • There is no evidence that Bert Ogden's service facilities are inadequate in relation to other dealers. • Bert Ogden had inadequate service parts, equipment, and personnel in relation to other dealers of new motor vehicles of the same line-make. • This factor weighs in favor of termination.	Termination/Subaru
Factor 5: Whether Warranties are Being Honored by the Dealer – PFD pp. 63-68, 92 • The evidence did not establish that Bert Ogden refuses to perform warranty work. • This factor weighs against termination.	Against Termination/Bert Ogden
Factor 6: Parties' Compliance with the Franchise, Except to the Extent that the Franchise Conflicts with Occupations Code Chapter 2301 – PFD pp. 69-80, 93 • Bert Ogden failed to comply with Subaru's staffing requirements, including those requiring exclusive sales and service staff, as well as the requirement for a certain number of sales consultants. • Bert Ogden did not fully comply with the franchise agreement. • This factor weighs in favor of termination.	Termination/Subaru
Factor 7: Enforceability of the Franchise from a Public Policy Standpoint, Including Issues of the Reasonableness of the Franchise's Terms, Oppression, Adhesion, and the Parties' Relative Bargaining Power – PFD pp. 81-82, 93 • The dealer agreement contains standard terms and is not an unconscionable contract of adhesion.	Termination/Subaru

Summary of ALJs' Analysis	
Factor	**Evidence in Favor of:**
• Bert Ogden's owner is an experienced and sophisticated business owner.	
Whether the Desire for Market Penetration is the Sole Basis for Termination – PFD pp. 83, 93 • Subaru is not seeking termination solely to increase market penetration.	Neutral/Neither Party

Board Authority in this Contested Case

1. TEX. OCC. CODE §2301.453 establishes the requirements for a distributor's termination of a franchise.
2. TEX. OCC. CODE §2301.453(g) imposes the burden of proof on the distributor to establish, by a preponderance of the evidence, that there is good cause for the termination of the franchise.
3. TEX. OCC. CODE §2301.455 provides factors the Board must consider when determining whether the distributor established good cause for the proposed franchise termination.
4. TEX. OCC. CODE §2301.709 requires the board to issue a final order in this case.
5. TEX. GOV'T CODE §2001.058(e), allows an agency to change a finding of fact or a conclusion of law made by the ALJ only if the ALJ:
    a. misapplied or misinterpreted applicable law, agency rules, written policies provided to the ALJ by the agency, or prior administrative decisions,
    b. relied on a prior administrative decision that is incorrect or should be changed, or
    c. made a technical error in a finding of fact that should be changed.

    The Board must state in writing the specific reason and legal basis for a change made to a finding of fact or conclusion of law.

Attachments

The following documents are attached to this Executive Summary for consideration by the Board:

1. July 19, 2022 SOAH ALJ PFD
2. August 3, 2022 Bert Ogden's Exceptions to the ALJ PFD, Including Attachments A and B
3. August 18, 2022 Subaru's Reply to Bert Ogden's Exceptions to the PFD, Including Exhibit A
4. October 17, 2022 SOAH ALJ Exceptions Letter
5. March 23, 2023 Burt Ogden Subaru Written Materials
6. March 23, 2023 Subaru of America Written Materials

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SOAH ALJ PFD

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STATE OFFICE OF ADMINISTRATIVE HEARINGS RECEIVED ON 7/19/2022 8:36 AM

FILED
608-21-0988
7/19/2022 8:36 AM
STATE OFFICE OF
ADMINISTRATIVE HEARINGS
Pegah Nasrollahzadeh, CLERK

ACCEPTED
608-21-0988
7/19/2022 11:07:08 am
STATE OFFICE OF
ADMINISTRATIVE HEARINGS
Pegah Nasrollahzadeh, CLERK

State Office of Administrative Hearings

Kristofer S. Monson
Chief Administrative Law Judge

July 19, 2022

Daniel Avitia, Director
Motor Vehicle Division
Texas Department of Motor Vehicles
4000 Jackson Ave.
Austin, TX 78731

VIA EFILE TEXAS

Re: SOAH Docket No. 608-21-0988.LIC; Texas Department of Motor Vehicles No. 21-0004-LIC; McAllen Jeep, Inc. d/b/a Bert Ogden Subaru v. Subaru of America Inc.

Dear Mr. Avitia:

Please find enclosed a Proposal for Decision in this case. It contains my recommendation and underlying rationale.

Exceptions and replies may be filed by any party in accordance with 1 Texas Administrative Code § 155.507(b), a SOAH rule which may be found at www.soah.texas.gov/administrative-rules-and-laws.

Susan Rodriguez

Susan Rodriguez
Presiding Administrative Law Judge

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Rebecca S Smith

Rebecca Smith

Presiding Administrative Law Judge

RS/tt

Enclosure

cc: James E. Cousar, Thompson & Knight LLP, 98 San Jacinto Blvd., Suite 1900, Austin, TX 78701- **VIA EFILE TEXAS**
Mark T. Clouatre, Attorney At Law, Nelson Mullins, 1400 Wewatta St., Suite 500, Denver, CO 80202 - **VIA EFILE TEXAS**
Marie Medina, Docket Clerk, Texas Department of Motor Vehicle, 4000 Jackson Ave., Austin, TX 78731 - **VIA EFILE TEXAS**

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SOAH Docket No. 608-21-0988 Suffix: LIC

BEFORE THE STATE OFFICE OF ADMINISTRATIVE HEARINGS

MCALLEN JEEP, INC. D/B/A BERT OGDEN SUBARU,
PROTESTANT
V.
SUBARU OF AMERICA INC.,
RESPONDENT

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SOAH Docket No. 608-21-0988 Suffix: LIC

BEFORE THE STATE OFFICE OF ADMINISTRATIVE HEARINGS

MCALLEN JEEP, INC. D/B/A BERT OGDEN SUBARU,
PROTESTANT
V.
SUBARU OF AMERICA INC.,
RESPONDENT

PROPOSAL FOR DECISION

McAllen Jeep, Inc. d/b/a Bert Ogden Subaru (Bert Ogden), a franchised dealership, filed a protest with the Texas Department of Motor Vehicles (Department or Board)[1] regarding the decision by Subaru of America, Inc. (SOA) to terminate its dealership agreement for a Subaru dealership in Edinburg, Texas.

[1] The applicable statutes reference the "board" which is the Department and its governing board. Tex. Occ. Code §§ 2301.002(2), .005(a). The terms Board and Department are used interchangeably in this PFD.

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After considering the evidence and arguments presented, the Administrative Law Judges (ALJs) find that SOA has established good cause to terminate Bert Ogden's dealer agreement in accordance with section 2301.455. Accordingly, the ALJs recommend that Bert Ogden's protest be denied.

I. NOTICE, JURISDICTION, AND PROCEDURAL HISTORY

There are no contested issues of notice or jurisdiction in this proceeding. These matters are addressed in the findings of fact and conclusions of law without further discussion.

On August 20, 2020, SOA sent a letter notifying Bert Ogden of its intent to terminate its dealership agreement. On January 8, 2021, Bert Ogden filed its Notice of Protest with the Department. Also on January 8, 2021, the Department referred the protest to the State Office of Administrative Hearings (SOAH) for a contested hearing and on January 14, 2021, issued a Notice of Hearing to the parties.

The hearing on the merits was held via Zoom videoconference January 18-21, 24-28, and 31, 2022, before ALJs Rebecca Smith and Susan Rodriguez. At the hearing, Bert Ogden was represented by its counsel, Dan Worthington, James Cousar, and Brent Bishop. SOA was represented by its counsel, Mark T. Clouatre, Steven B. McFarland, and Adrienne L. Toon.

Fifteen witnesses testified live at the hearing. SOA presented testimony from (1) Troy Poston, Vice President of SOA's Eastern Region; (2) David Adams, the

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current director of SOA's DFW Zone; (3) Michael Teti, SOA's Director of Sales Planning and Analysis; (4) Casey Griffin, Vice President of SOA's Central Region; (5) George Dubinsky, SOA's National Owner Loyalty Manager; (6) Richard Yannella, District Sales Manager for District 3 from 2016-2020; (7) Hector Flores, District 3's District Service and Parts Manager; (8) Elise Seoles, Zone Retailer Marketing Manager; (9) Mason Delapp, District Sales Manager for District 3; (10) expert witness Jay Lytle; and (11) expert witness Sharif Farhat. Bert Ogden presented testimony from (1) Geoff Mauldin, Bert Ogden's General Manager; (2) Natasha del Barrio, the CEO of the Bert Ogden Group; (3) Robert Vacker, the owner of the Bert Ogden Group and President of Bert Ogden; and (4) expert witness Joseph Roesner. The parties also presented testimony from the following witnesses in the form of deposition excerpts: David Boyer, SOA's Retail Development Manager for the DFW Zone; Chris Hurst, SOA's Manager of Insights; Miguel Castillo, Bert Ogden Group's Digital Marketing Director; Marsha Green, Bert Ogden Group's Vice President of Marketing; Robert Lucio (former CEO of the Bert Ogden Group); and Johnny Rodriguez, Bert Ogden Group's Public Relations Manager.

The record closed on May 20, 2022, after the parties' post-hearing briefs and response briefs were filed.

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II. APPLICABLE LAW

Texas Occupations Code (Code) chapter 2301 grants the Department statutory authority to regulate franchise relationships between dealers and motor vehicle manufacturers. Among other things, the Code contains limits on a manufacturer's ability to terminate a franchise agreement with a dealership, requiring that any protested termination must first be approved by the Department.[2] Specifically, Code § 2301.453 provides:

> (a) Notwithstanding the terms of any franchise, a manufacturer, distributor, or representative may not terminate or discontinue a franchise with a franchised dealer . . . unless the manufacturer, distributor, or representative provides notice of the termination or discontinuance as required by Subsection (c) and:
>
> (1) the manufacturer, distributor, or representative receives the dealer's informed written consent;
>
> (2) the appropriate time for the dealer to file a protest under Subsection (e) has expired; or
>
> (3) the board makes a determination of good cause under Subsection (g).

In determining whether to there is "good cause under Subsection (g)" to approve a franchise termination, the Department must determine, following a hearing, whether the manufacturer has established, by a preponderance of the

[2] Tex. Occ. Code § 2301.453.

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evidence, that there is good cause for the proposed termination.[3] Code § 2301.455 lists the factors that inform the Department's good-cause determination. It states:

> (a) Notwithstanding the terms of any franchise, in determining whether good cause has been established under Section 2301.453 . . . the board shall consider all existing circumstances, including:
>
> (1) the dealer's sales in relation to the sales in the market;
>
> (2) the dealer's investment and obligations;
>
> (3) injury or benefit to the public;
>
> (4) the adequacy of the dealer's service facilities, equipment, parts, and personnel in relation to those of other dealers of new motor vehicles of the same line-make;
>
> (5) whether warranties are being honored by the dealer;
>
> (6) the parties' compliance with the franchise, except to the extent that the franchise conflicts with this chapter; and
>
> (7) the enforceability of the franchise from a public policy standpoint, including issues of the reasonableness of the franchise's terms, oppression, adhesion, and the parties' relative bargaining power.[4]

The Code states that "[t]he desire of a manufacturer, distributor, or representative for market penetration does not by itself constitute good cause."[5]

[3] Tex. Occ. Code § 2301.453(g).

[4] Tex. Occ. Code § 2301.455(a).

[5] Tex. Occ. Code § 2301.455(b).

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If a dealer files a timely protest, then the Department is required to notify the manufacturer, a hearing must be held, and the manufacturer may not terminate the franchise until the Department issues a final decision finding good cause for the termination.[6]

SOA has the burden of proving, by a preponderance of the evidence, that there is good cause to terminate Bert Ogden's franchise.[7]

III. BACKGROUND

A. Subaru of America

SOA is the United States distributor of Subaru vehicles.[8] SOA is divided into three regions—east, central, and west—which are, in turn, each broken into four zones.[9] In the central region, the zones are based in Chicago, Columbus, Minneapolis, and Dallas.[10] The Dallas-based zone, which SOA calls the DFW Zone, includes 44 retailers in Texas, Louisiana, Arkansas, Oklahoma, and New Mexico, as well as Jackson, Mississippi and Memphis, Tennessee.[11] Each zone is broken into geographically-defined districts containing between 10 to 12 retailers.[12]

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[6] Tex. Occ. Code § 2301.453(a)(3), (f)(1)-(3).

[7] Tex. Occ. Code § 2301.453(g); 1 Tex. Admin. Code § 155.427.

[8] Transcript (Tr.) Vol. 1 at 58.

[9] Tr. Vol. 1 at 59.

[10] Tr. Vol. 1 at 59-60.

[11] Tr. Vol. 2 at 297.

[12] Tr. Vol. 1 at 60.

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Sales of Subaru vehicles have increased dramatically in recent years. According to Bert Ogden expert Joseph Roesner, "Subaru years ago was considered more of a niche product, and it's, you know, now become a mass market . . . , one of the fastest growing."[13] Troy Poston, the former director of the DFW Zone, testified that in 2009, approximately 7,500 Subaru vehicles were sold in the DFW Zone; by 2019, sales of Subarus in the zone totaled 45,000.[14] SOA vehicles, with the exception of the BRZ, are all-wheel drive[15] and have traditionally been more popular in snowy regions.

SOA witnesses testified about some of the differences in the way the company approaches its business as compared to some other manufacturers. SOA intentionally operates on a lower days' supply[16] than many other brands, so there is not excess inventory. Mr. Poston distinguished SOA's approach and explained it as part of SOA's emergence as a stronger brand and as a way to create value:

> You know, part of the transformation that we made as a brand really back in 2006 and 2007, is that, you know, we knew we needed to fundamentally change. We weren't going to out Toyota, Toyota, or out Honda, Honda, or out Nissan, Nissan, and so we really changed our game and our products and our value statement, what we were all about, and we sought out to lower our supply, so improve the value, crank down the days' supply.

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[13] Tr. Vol. 9 at 2389.

[14] Tr. Vol. 1 at 68-69.

[15] Tr. Vol. 2 at 441.

[16] As discussed in greater detail later, days' supply is an auto industry measurement that is calculated by comparing how much of something is sold per day to how much of that item is in inventory.

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. . . .

Ours is a little different at Subaru where we come up with what we believe we can sell based on the market. We go back to our parent company and ask them for that level of production. But we manage our inventory to a lower level.

. . . .

Through history, you know, over the last 10, you know, 12 years or so, other brands like Nissan, Chrysler/Dodge, others, so they typically run with a lot higher days' supply on the ground and they also have units that are readily available, vehicles that are already produced that are sitting someplace and so very different. You know, someone can pick up the phone with one of them and say, Hey, I need some cars. Well, they may have cars sitting somewhere that they can ship over to them. We don't have fence cars, if you will. We haven't had that in over a decade. We sell future production so a vehicle that's not actually built from a domestic perspective and we sell to our retailers imports, cars, once they land at port, that way, you know, we only promise what we think we can deliver the next month.

. . . .

That is our goal. We want to do that. When things equalize [after the chip shortage], we will continue to manage to a lower days' supply because we like that. We like the value statement that that provides, proves profitability for our retailers, it cuts down incentives, and it really supports the overall health of your brand.[17]

[17] Tr. Vol. 1 at 142-44.

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According to Mr. Poston, this difference is important for a dealer to realize: "If you try to go to market with Subaru the way you do Nissan, it's not going to work."[18]

B. BERT OGDEN SUBARU

Bert Ogden is owned by Janet Ogden Vackar and Robert C. Vackar,[19] who is its president and dealer principal.[20] Bert Ogden is part of the Bert Ogden Group, which owns 23 other franchises and operates 19 different dealerships throughout the Rio Grande Valley area of Texas.[21] Mr. Vackar is the group's chairman of the board; Natasha del Barrio is its CEO. Bert Ogden is located within the DFW Zone's District 3, which contains dealerships in Houston, San Antonio, Selma, Nederland, Bryan, and Corpus Christi, Texas.

The Bert Ogden dealership shares a location with the Bert Ogden Group's Volvo and Mazda dealerships.[22] The Mazda dealership is housed in its own building. The Volvo dealership and Bert Ogden share a building, but a customer cannot walk between those two dealerships without physically leaving the building and re-entering.[23] Bert Ogden Group's Subaru, Volvo, Kia, and two Mazda dealerships all share the same general manager.[24] Since at least 2012, Bert Ogden

[18] Tr. Vol. 1 at 145.

[19] Bert Ogden Ex. 437 at 4622.

[20] Tr. Vol. 7 at 1836; SOA Ex. 11.

[21] Tr. Vol. 7 at 1862.

[22] Tr. Vol. 6 at 1500.

[23] Tr. Vol. 8 at 1969.

[24] Tr. Vol. 7 at 1664.

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has not had a general manager devoted only to Subaru.[25] Geoff Mauldin, who holds the general manager position testified, however, that his primary focus is on Subaru.[26] As of the date of the hearing, the same general sales manager oversees sales at Bert Ogden Group's Subaru, Mazda, and Volvo dealerships.[27] All Bert Ogden Group salespeople may cross-sell other makes of vehicles.[28] Thus, from the same location, Bert Ogden salespeople could sell a customer a Mazda or a Volvo.

C. Agreements Between SOA and Bert Ogden

After being recruited by SOA, Bert Ogden first entered into a dealer agreement with SOA on September 23, 2009.[29] The agreement contains standard provisions setting out SOA's expectations for all its dealers. Those provisions include establishing a goal of achieving the highest level of customer satisfaction possible; requiring the dealer to use its best efforts to aggressively, actively, and effectively promote the sale of Subaru products; requiring the dealer to effectively sell Subaru products to customers in its area of responsibility (AOR); and providing that those sales would be evaluated relative to SOA sales objectives and against other Subaru dealers.[30]

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[25] Tr. Vol. 8 at 1972.

[26] Tr. Vol. 7 at 1684.

[27] Tr. Vol. 8 at 1973.

[28] Tr. Vol. 5 at 1254; Tr. Vol. 7 at 1798.

[29] Tr. Vol. 1 at 67-68; SOA Ex. 1.

[30] Tr. Vol. 1 at 73-78.

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Although the Bert Ogden dealership is located in Edinburg, TX, its AOR is called the Pharr AOR. The Pharr AOR covers the western portion of the Rio Grande Valley, including Edinburg, McAllen, and Harlingen, but stopping just on the far side of Harlingen, thus excluding San Benito, Brownsville, and most of Cameron County.[31] This area has a growing population, and growth is expected to continue.[32] Mr. Vackar described the Rio Grande Valley as "growing by leaps and bounds."[33] The current population of the AOR is almost one million people.[34] Mr. Mauldin described the area around McAllen, Edinburg, and Mission—where the AOR is centered—as "some of the most affluent areas in the Rio Grande Valley."[35]

On May 20, 2014, SOA and Bert Ogden entered into a Sales Performance Addendum to their contract.[36] At that time, Bert Ogden was behind its minimum sales responsibility (MSR)—a measure of sales that will be discussed later—by 288 vehicles. In the 2014 sales addendum, Bert Ogden agreed to reach its MSR, which was 547 vehicles, unless the market conditions in the AOR decreased.[37] By December 2015, Bert Ogden was at 35.44% of its MSR, having sold a total of 269 vehicles during 2015.

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[31] SOA Ex. 188 at 22.

[32] Tr. Vol. 6 at 1555.

[33] Tr. Vol. 8 at 2100.

[34] Tr. Vol. 8 at 2099.

[35] Tr. Vol. 7 at 1694.

[36] SOA Ex. 5.

[37] Tr. Vol. 1 at 1106-08.

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On June 23, 2015, the parties entered into an Owner Loyalty Program (OLP) Performance Addendum, which required Bert Ogden to improve its purchase and service experience satisfaction scores by December 31, 2016, to a level equal to the Central Region's average scores.[38]

Bert Ogden entered into a new dealer agreement with SOA on July 1, 2017.[39] At the same time, SOA and Bert Ogden entered into a second Sales Performance Addendum.[40] When the agreement was signed, Bert Ogden's MSR—the measure of vehicles SOA expected it to sell—was 860 vehicles, but it had only sold 359 vehicles. The 2017 Sales Performance Addendum required Bert Ogden to reach 50% of MSR for the one-year period ending June 30, 2018; to reach 60% of MSR for the one-year period ending June 20, 2019; and then to reach 70% of MSR for the one-year period ending June 30, 2020. Casey Griffin, SOA's Vice President for the central region, testified that other than for Bert Ogden, he never signed an agreement that allowed a dealer to perform at 50% of MSR, nor has he signed a sales performance addendum lasting three years for anyone else. Mr. Poston, the DFW Zone Director at the time, testified that a three-year sales performance addendum "was a big reach" for SOA, but SOA wanted Bert Ogden to get a degree of success and then work from there.[41] Mr. Griffin understood that the addendum was something SOA had worked with Bert Ogden on because Mr. Vackar wanted

[38] SOA Ex. 7.

[39] SOA Ex. 11.

[40] SOA Ex. 12.

[41] Tr. Vol. 1 at 114.

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more time to be able to improve and hit sales targets, and SOA accommodated that request.[42]

Mr. Griffin also testified that he discussed Subaru's business model with Mr. Vackar because he wanted to be sure that Mr. Vackar understood that Subaru's model is not to open lots of stores but rather to put in successful stores that are able to grow the customer base.[43] Mr. Griffin said he did not think Mr. Vackar had a good understanding of Subaru's business model and philosophy.[44] Mr. Vackar took Mr. Griffin to his Nissan dealership and discussed the volume of business at that dealership.[45] Mr. Griffin said Mr. Vackar does a large volume of business at his Nissan dealership, but that Nissan's business model is the opposite of Subaru's: Nissan has more inventory than demand, whereas Subaru prefers to have more demand than supply because high demand keeps inventories, and, therefore, costs low.[46] Mr. Poston testified he also explained SOA's model to Mr. Vackar.[47]

SOA expressed concern with turnover, staffing, and focus at Bert Ogden. Dave Adams, the current DFW Zone Director and former zone market development manager, described the issues as:

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[42] Tr. Vol. 3 at 686-87.

[43] Tr. Vol. 3 at 678-79.

[44] Tr. Vol. 3 at 679.

[45] Tr. Vol. 3 at 679.

[46] Tr. Vol. 3 at 679-80.

[47] Tr. Vol. 1 at 144-45.

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> We had a lot of staffing turnover with finance and insurance managers. We had a tremendous amount of turnover with the salespeople in general, we had tremendous turnover in sales management. We never really had any exclusive focus on the brand. We would constantly be shared with finance managers from Mazda, customers from Volvo and basically just a lack of focus.[48]

He added that SOA frequently had to chase Bert Ogden employees to get certified and that the issue was particularly acute with finance and insurance employees who were unfamiliar with Subaru products and features.[49]

SOA's frustration was not one-sided. In her testimony, Ms. del Barrio testified that SOA was the only manufacturer that would not pick up the phone and call the company.[50] Mr. Mauldin and Mr. Vackar testified that they wanted more inventory than SOA was providing them.[51]

D. Notice of Intention to Terminate

Eventually, SOA decided to terminate its dealer agreement with Bert Ogden. Mr. Griffin testified that SOA takes the proposed termination of a dealer very seriously. Terminations are infrequent, and SOA tries to give dealers an opportunity to resolve problems, as it did with Bert Ogden's three-year sales addendum.[52] The decision to terminate was made after reviewing sales data, MSR

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[48] Tr. Vol. 2 at 303.

[49] Tr. Vol. 2 at 304-05.

[50] Tr. Vol. 8 at 1982-83.

[51] Tr. Vol. 7 at 1714; Tr. Vol. 8 at 2070.

[52] Tr. Vol. 3 at 688.

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data, customer satisfaction data, and a Better Business Bureau report.[53] Mr. Griffin testified that he also reviewed the number of additional vehicles SOA provided to Bert Ogden, sales agreement results, OLP information, and the opinions of employees in the DFW Zone.[54] The sales agreement results that were reviewed included the results under the 2017 Sales Performance Addendum.[55]

Mr. Griffin signed the August 20, 2020 Notice of Intention to Terminate, which informed Bert Ogden that SOA intended to terminate the dealer agreement, effective the 61st day following receipt of the letter.[56] The notice listed three specific grounds for the termination: failure to comply with sales performance obligations; operational deficiencies in the dealership; and Bert Ogden's failure to achieve acceptable levels on SOA's customer satisfaction measurement tool.

Since the termination notice was issued, Bert Ogden increased its sales. For a few months, it was a significant increase. Beginning around August or September 2020, Bert Ogden's sales performance almost doubled in a 90-day period.[57] Since that time, however, the rate has slowed down. The total number of vehicles Bert Ogden has sold has increased from the number at the time of the termination notice. For example, in 2017, Bert Ogden sold 337 new vehicles; in 2021,

[53] Tr. Vol. 3 at 687-88.

[54] Tr. Vol. 3 at 711, 730-31.

[55] Tr. Vol. 3 at 711-12.

[56] SOA Ex. 172.

[57] Tr. Vol. 3 at 599.

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Bert Ogden sold just shy of 500 new vehicles.[58] The 2021 sales remain below the MSR, and below the numbers the 2017 sales performance addendum required after the first year.

IV. TERMINATION NOTICE

Code § 2301.453 provides that a manufacturer cannot terminate a franchise agreement unless written notice is sent to the dealer "stating the specific grounds for the termination or discontinuance."[59] Bert Ogden argues that, based on this requirement, only the "specific grounds" set out in the termination notice can be examined.

The ALJs disagree. The Code requires a consideration of all existing circumstances, including the enumerated good-cause factors. The analysis is not limited to those reasons set out in the termination notice.

Bert Ogden does not raise any objections to the notice, other than that it should limit the considerations at hearing, and the ALJs find that SOA met the Code's notice requirements.

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[58] Tr. Vol. 7 at 1866. In its briefing, Bert Ogden suggests the 2021 number is actually higher, pointing to Exhibit 64, which is dated September 2021, and lists a rolling-year-to-date sales total of 515. Because it is a rolling-year-to-date number, it includes the totals from the end of 2020. (*See, e.g.*, SOA Ex. 172 at 3 n.1 ("Rolling-year-to-date or RYTD means the prior 12-month period ending on the month indicated.")) The ALJs do not interpret Exhibit 64 as suggesting that Bert Ogden sold greater than 515 new vehicles in 2021.

[59] Tex. Occ. Code § 2301.453(c). The statute also requires that notice be sent, via registered or certified mail; be received at least sixty days before the effective date of the termination; and that it contain prominent information notifying the dealer of its right to file a protest. Bert Ogden does not contest SOA's compliance with these elements.

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V. STATUTORY GOOD-CAUSE FACTORS

The legislature has directed that SOA bears the burden of establishing that good cause exists to terminate Bert Ogden's franchise, and that good cause takes into consideration "all existing circumstances."[60] Each statutory factor is discussed below.

A. Sales in Relation to the Market

The first of the statutory good cause factors is Bert Ogden's "sales in relation to the sales in the market."[61] SOA generally argues that Bert Ogden has consistently been the lowest-performing dealer in the DFW Zone (and thus, in the district). Bert Ogden, in contrast, argues that SOA measures sales inappropriately, particularly given the specific characteristics of the Pharr AOR.

The metric SOA uses for evaluating a dealer's sales performance is called MSR.[62] This nationwide system was in place when Bert Ogden signed its dealership agreement.[63] According to SOA expert Sharif Farhat, the MSR is "nearly identical" to the methods used by other manufacturers.[64] The MSR is calculated by geographic area and is based on segments—groups of similar, competitive vehicles in terms of size, configuration, and price. SOA only looks at segments in which it

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[60] Tex. Occ. Code §§ 2301.453(g), .455(a).

[61] Tex. Occ. Code § 2301.455(a)(1).

[62] Tr. Vol. 1 at 81, 82.

[63] Tr. Vol. 1 at 81.

[64] Tr. Vol. 6 at 1488.

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sells vehicles; for example, it does not consider pickup trucks.[65] Based on the vehicles it distributes, SOA uses the following segments: compact crossover utility vehicle (CUV), compact conventional, compact sporty, midsize conventional, and midsize CUV.

For each of these segments, SOA determines the MSR by first calculating the percentage of new registered vehicles in the relevant area that are Subaru vehicles. In a 2014 example Mr. Poston presented in his testimony, the Subaru Forester's market share of the compact CUV segment was 5.09%. Therefore, Bert Ogden's MSR for Foresters (a Subaru compact CUV) would be 5.09% of the total number of new compact CUV vehicles registered in the Pharr AOR for a rolling 12-month period. In the 2014 example, 4,869 compact CUVs were registered in the Pharr AOR, and 5.09% of 4,869 is 248. Accordingly, Bert Ogden's MSR for Foresters for that period was 248.

Although its MSR was 248 Foresters, during that period, Bert Ogden sold 98 Foresters.[66] Sales anywhere would be counted toward the MSR. Thus, if Bert Ogden sold to someone outside its AOR—as it did for some of the vehicles in the 2014 example—those sales would be counted toward its MSR. Likewise, as Bert Ogden points out, other dealers' sales outside their AORs count toward their MSR achievement.

[65] Tr. Vol. 1 at 85.

[66] SOA Ex. 57.

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Through 2017, SOA used the DFW Zone as the benchmark for the MSR. In other words, the 5.09% discussed above was based on the percentage of new Subaru registrations in the entire zone. In 2018, SOA changed its benchmark and began using registrations in the district—in Bert Ogden's case, District 3.[67] According to Mr. Farhat, this change reduced the expectations SOA put on Bert Ogden.[68]

SOA considers a retailer who achieves 100% MSR to be an average retailer.[69] For the 2014 example Mr. Poston described, Bert Ogden's achieved only 43.14% of its overall MSR.[70] It is undisputed that Bert Ogden has been below its MSR the entire time it has been a Subaru dealership.[71]

Although SOA considered a retailer who achieved MSR to be average, Bert Ogden's expert, Mr. Roesner, testified that SOA's charts indicate that very few dealers had sales right at 100% MSR.[72] Most dealers scored above the MSR; some were below.

As discussed previously, SOA and Bert Ogden entered into two different sales performance addendums to their contract.[73] The first was entered into in May 2014, following a time when Bert Ogden was behind its MSR by 288 vehicles.

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[67] Tr. Vol. 6 at 1520.

[68] Tr. Vol. 6 at 1521.

[69] Tr. Vol. 5 at 1205.

[70] Tr. Vol. 1 at 89; SOA Ex. 57.

[71] Tr. Vol. 8 at 1992. *See also* Tr. Vol. 1 at 96 (describing Bert Ogden's 10-year sales performance as "very poor").

[72] Tr. Vol. 8 at 2224-25.

[73] SOA Exs. 5, 12.

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In the 2014 sales addendum, Bert Ogden agreed to reach its MSR (547 vehicles) unless the market conditions in the AOR decreased.[74] By December 2015, Bert Ogden was at 35.44% of its MSR, having sold a total of 269 vehicles during 2015.

SOA and Bert Ogden entered into a second sales performance addendum in July 2017.[75] At that time, Bert Ogden's MSR was 860 vehicles, but it had only sold 359 vehicles. The 2017 Sales Performance Addendum required Bert Ogden to reach 50% of MSR for the one-year period ending June 30, 2018; to reach 60% of MSR for the one-year period ending June 20, 2019; and then to reach 70% of MSR for the one-year period ending June 30, 2020.

Bert Ogden did not reach 50% of MSR in the initial one-year period of the 2017 sales performance addendum.[76] As of December 2018, Bert Ogden was selling at 44.10% of MSR, which ranked in the bottom 10% of the DFW Zone retailers.[77] In fact, Bert Ogden had the lowest MSR rank in the DFW Zone for the period 2016-2020, achieving an average of 41.3% of its MSR.[78] The second-to-lowest

[74] Tr. Vol. 1 at 1106-08.

[75] SOA Ex. 12.

[76] Tr. Vol. 1 at 118. As discussed later, Bert Ogden points out that it came close to meeting the first year's requirement.

[77] SOA Ex. 113.

[78] SOA Ex. 188 at 043.

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dealership's MSR average for that period was 60.3%.[79] Mr. Farhat also testified that for 2020, 31 of the 43 dealers in the DFW Zone met or exceeded MSR.[80]

Mr. Farhat testified that there was also a "pretty high" level of in-sell into the Pharr AOR. In-sell means that a new Subaru vehicle was registered in the Pharr AOR but was purchased somewhere other than at Bert Ogden. Mr. Farhat called this level of in-sell at a remote dealership "surprising."[81]

SOA presented evidence about other issues related to sales. For example, in 2019, of all the District 3 dealers, Bert Ogden took the longest time to respond to leads.[82] Rich Yannella, SOA's former District 3 manager, described walking into the dealership and finding no employees in the showroom.[83] Mr. Yannella also testified that he conducted a mystery shop and sent in an internet lead.[84] He received a response regarding a Subaru Outback, but after that he received a response offering him a Mazda.[85] He sent another mystery shopper to submit an internet lead to Bert Odgen; this shopper received information about a Volvo.[86]

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[79] SOA Ex. 188 at 045. The second-to-lowest was in the DFW Zone but in a different district than Bert Ogden. The second-lowest performing dealership in District 3, Bert Ogden's district, averaged 60.9% of MSR for that period.

[80] Tr. Vol. 6 at 1523; SOA Ex. 188 at 035.

[81] Tr. Vol. 6 at 1568.

[82] Tr. Vol. 4 at 882; SOA Ex. 70.

[83] Tr. Vol. 4 at 886.

[84] A mystery shop is a method of using an undercover employee or contractor posing as a potential customer in order to check on a dealer's customer service. It is discussed in greater detail in the section on warranties, Section E.

[85] Tr. Vol. 4 at 896.

[86] Tr. Vol. 4 at 898.

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Although SOA argues that Bert Ogden's low sales, as reflected by the low MSR percentage it achieved, supports termination, Bert Ogden argues that the MSR is an inherently inappropriate and unreliable metric and that it is unfair to compare the Pharr AOR to anywhere else. It also argues that SOA cannot terminate the contract of a dealer whose sales are increasing, that it received insufficient inventory to sell vehicles effectively, that previous retailers in the AOR have done poorly, and that it is being punished for the success of other Bert Ogden Group retailers.

1. Use of MSR to Measure Sales in Relation to the Market

Bert Ogden argues that caselaw supports its position that MSR, in general, is an unfair method for measuring sales effectiveness. The first case it cites is one that notes the New York high court held it unreasonable for GM to use a statewide performance standard to determine compliance with a franchise agreement.[87] In the second case it cites, the Texarkana Court of Appeals considered a similar method in the context of compliance with the agreement.[88]

Notably, however, both cases analyze a statewide (in the case of *Beck*), or region-wide (in the case of *Nissan*) sales metric in the context of whether a dealer has breached the dealership agreement, not for the statutory factor of sales in relation to the market. Whether or not it is an appropriate tool for measuring compliance with a contract, MSR seems to the ALJs to be a helpful tool in

[87] *Beck Chevrolet Co. v. General Motors LLC*, 845 F.3d 68, 70 (2d Cir. 2016) (citing *Beck Chevrolet Co. v. General Motors LLC*, 53 N.E.3d 706, 713-14 (N.Y. 2016)).

[88] *Nissan N. Am., Inc. v. Texas Dep't of Motor Vehicles*, 592 S.W.3d 480 (Tex. App.—Texarkana 2019, no pet.).

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measuring a dealer's sales in relation to the market. Additionally, although Bert Ogden argues against using the MSR for this purpose, it does not propose an alternative.[89]

And as SOA has pointed out, the MSR is no longer a Zone-wide measure. Instead, since 2018, MSR has been based on other dealers within District 3, which does not include any snowy, mountainous regions. Assuming without deciding that a statewide comparison could be considered unfair, there is no reason from the evidence that a comparison based on sales data from other dealerships in District 3 is unfair. SOA has to be able to use some kind of comparative sales metric to be able to examine sales in relation to the market.

The ALJs find that MSR is a relevant and useful tool for analyzing Bert Ogden's sales in comparison to the market.

2. Flaws with the Benchmark

In its Closing Argument, Bert Ogden contends that, even if the MSR could generally be used, the benchmark SOA used for the MSR is flawed because the sales of models in the benchmark do not accurately track the actual sales of those vehicles in the Pharr AOR. It amplifies this argument and provides significantly greater detail (including an appendix) in its Reply Brief.[90]

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[89] Bert Ogden correctly points out that it does not have the burden of proof. However, it should suggest an alternative metric for the factor if it is going to argue that the only metric proposed is inappropriate.

[90] The evidence, in different form, was attached to Mr. Roesner's report, Bert Ogden Ex. 467.

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In its Closing Argument, relying on a December 2016 report, Bert Ogden indicates that in the Pharr AOR, Nissan Sentra exceeded the Zone-wide benchmark by a significant amount. The Nissan Sentra represented 28.39% of the AOR share for the compact conventional segment, but the benchmark indicated it should be 12.16%. On the other end, Bert Ogden points out that although the Toyota Corolla's Zone benchmark share for the same segment was 17.02%; in the Pharr AOR, sales of the Toyota Corolla were only 14.27% during that period. Similarly, the Honda Civic, with a benchmark share of 16.91%, only made up 9.53% of the segment sales in the Pharr AOR during the 12 months before December 2016.[91] According to Bert Ogden, these latter two are particularly significant because SOA's own research indicates that those two models are the most common seriously-considered models when comparing the Subaru Impreza to other models. In its reply brief, Bert Ogden delved even deeper into this comparison of all the differences between the benchmark and the actual sales in the Pharr AOR.

Bert Ogden's argument relating to the compact conventional benchmark is based on Zone-wide SOA research indicating that the two vehicles most seriously considered as substitutes for the Subaru Impreza (a compact conventional model) were the Honda Civic and the Toyota Corolla.[92] Bert Ogden expanded this discussion beyond the Impreza. Mr. Roesner testified that because the sales of the vehicles that purchasers in the Zone considered to be the most-seriously considered alternatives, segmentation does not account for all differences in a market. In its reply brief, Bert Ogden spends 19 pages setting out differences

[91] Bert Ogden's Closing Argument at 33.

[92] Tr. Vol. 9 at 2257.

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between AOR sales of various models and the benchmark, and then adds a 43-page appendix. Bert Ogden's brief also highlights a chart entitled "Top 5 Seriously Considered Vehicles (Subaru Excluded)" for the Impreza.[93] According to the chart, 10% of people who purchased an Impreza considered a Honda Civic, 7% considered a Toyota Corolla, 5% considered a Toyota RAV4, 5% considered a Toyota Camry, and 4% considered a Honda Accord. This, on its face, shows a total of 31% of Impreza purchasers considering a Toyota or Honda. It says nothing about what the remaining 69% considered. Additionally, Mr. Roesner agreed that it was not surprising for Honda and Toyota to be the most commonly considered alternatives as they are among the largest volume manufacturers nationally.[94]

Although Bert Ogden has established that the benchmark does not perfectly match the actual segment sales in the Pharr AOR, the ALJs do not find that point to have the significance Bert Ogden suggests. Again, the ALJs note that Bert Ogden has never suggested another metric for the "sales within the market" factor that the statue requires to be considered. It only argues that because Nissans and Buicks sell better in the Pharr AOR and Toyotas and Hondas sell worse, Bert Ogden cannot be expected to match the MSR because surveys list Toyotas and Hondas as the most common seriously-considered alternatives for people who end up buying Subarus.

Bert Ogden is not arguing that the segments are improperly created—that Subaru vehicles are placed in the incorrect segments or that other competitive

[93] Bert Ogden's Closing Argument at 34 (citing Bert Ogden Ex. 467, tab 7 at 12).

[94] Tr. Vol. 9 at 2381.

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vehicles should be considered. It is also not expressly arguing that Subaru sales should only be measured against Honda or Toyota sales. Nor is it saying the number of registered vehicles in the AOR for each segment is inaccurate.

The ALJs decline to find that because Honda and Toyota sales are lower in the Pharr AOR than in the SOA benchmark and because other vehicles, such as Nissans, have higher sales, the MSR cannot be used to examine Bert Ogden's sales. The suggestion that because Hondas and Toyotas underperform in the Pharr AOR, Subarus must, as well, is not supported by the evidence indicating that 31% of Subaru buyers seriously considered purchasing a Honda or Toyota.

3. Demographic and Geographic Characteristics

Bert Ogden next argues that the demographics and other features in the Pharr AOR make the use of the MSR particularly inappropriate for measuring its performance. Bert Ogden contends that the Pharr AOR is younger, less educated, less Caucasian, and lower-earning than the standard Subaru purchaser in either the rest of District 3 or the DFW Zone. Bert Ogden also argues that the geography of the Rio Grande Valley makes it particularly challenging to sell Subaru vehicles there. Objecting to SOA's use of the word "opportunity" in its briefing, Bert Ogden analogizes its business to a manufacturer of upscale snow tires opening a franchise in Miami and argues that such a franchise could not be considered an opportunity.[95]

[95] Bert Ogden Reply Brief at 14. Mr. Roesner, Bert Ogden's expert witness, also used the word "opportunity" when, for example, testifying that MSR is "a measure of market opportunity within the dealer's area." Tr. Vol. 8 at 2225.

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SOA argues that, by comparing sales to other segment sales in the AOR, the MSR sufficiently adjusts for preferences in the local market. SOA has argued that segmentation focuses on the specific types of vehicles being purchased in an AOR. It continues, "Because local consumer preferences are reflected in the actual number of vehicles registered within each segment, this process expressly accounts for any socioeconomic factors (such as age, income, or local economic factors) that may impact the specific type of vehicles that consumers decide to purchase in a particular market."[96]

a) Evidence

At hearing, Bert Ogden presented expert testimony from Mr. Roesener. One of the topics he addressed in detail was the ways in which the Pharr AOR was both demographically and geographically different from other AORs within the DFW Zone. For example, he created a chart ranking the AORs in the Zone by annual snowfall. The highest by far was Santa Fe's annual 22.68 inches.[97] Bert Ogden's AOR, with an annual snowfall of 0.04 inches, had the fourth-lowest annual snowfall in the Zone. Mr. Roesner also testified about, for example, the absence of ski areas within 4 hours of the Pharr AOR. He also testified that the median income was significantly lower in the Pharr AOR relative to the other AORs, as was the percentage of the population without a high school diploma.[98] He did a significant number of regression analyses showing correlation between sales and various demographic factors and Subaru purchases.

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[96] SOA's Reply Brief at 6.

[97] Bert Ogden Ex. 467, tab 20 at 3.

[98] Tr. Vol. 9 at 2321-22.

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Yet Mr. Roesner also agreed, on cross examination, that he could not say there was a statistically significant correlation between median household income and MSR achievement or between what percentage of the population is Hispanic and MSR achievement.[99] Also, based on his snowfall chart, none of the dealers in District 3 had annual snowfall of over 0.24 inches. From his chart, it was also apparent that the second-lowest performer in the Zone, the dealership in Midland, had the 10th highest average annual snowfall.

The parties both agree that MSR is the factor with the highest correlation to sales, although they disagreed about what that correlation was.[100] SOA presented testimony to effect that this correlation makes sense: dealers in larger markets sell more vehicles than dealers in smaller ones.[101]

Mr. Farhat, Mr. Lytle, and to a lesser extent Mr. Roesner, agreed that the correlation shown in a regression analysis does not show causation.[102] In other

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[99] Tr. Vol. 9 at 2421. To the extent Bert Ogden complains about the lack of Spanish-language television advertising or not being part of a pilot program for television ads in Spanish, Mr. Vackar described advertising on Spanish-language television as "ineffective" and agreed that Bert Ogden did not itself spend money on it. Tr. Vol. 8 at 2162.

[100] Tr. Vol. 6 at 1491-93; SOA Ex. 188 at 20-21. In his report, Mr. Farhat found the R^2 (a measure of correlation) of retail sales and MSR to be 0.9132, a very high level of correlation. Mr. Roesner objected to Mr. Farhat forcing the y-intercept through zero in his original report. Mr. Farhat ran a second report, without forcing the y-intercept through zero, and found a R^2 of 0.5476 for 2020 and 0.6942 for 2021, a less strong correlation. SOA Ex. 189 at 002-003. Mr. Farhat testified that he forced the intercept through zero because otherwise it would not make sense; if there was no demand (zero MSR on the x-axis), there would not be sales greater than zero. Tr. Vol. 6 at 1655-56. The ALJs do not need to resolve the conflict, but note there is a meaningful amount of correlation between MSR and dealer sales.

[101] Tr. Vol. 6 at 1493.

[102] Tr. Vol. 6 at 1450; Tr. Vol. 10 at 2521.

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words, the regression analysis cannot show that, for example, having a population with a higher level of education leads to greater sales.

For its part, SOA presented testimony calling the significance of these differences into question, noting for example, that there are no ski areas within four hours of Austin, whose Subaru dealer sells the largest number of vehicles in the United States. SOA also obtained testimony from Mr. Roesner agreeing that an all-wheel drive vehicle might be fun on the beach at South Padre Island, which is close to the Pharr AOR.[103]

SOA also points to Mr. Vackar's testimony that he wanted to build a second Subaru dealership in the Valley, between Harlingen and Brownsville, and noted that Mr. Vackar also testified that he has confidence that Subaru vehicles can sell in the Rio Grande Valley.[104]

b) Analysis

The ALJs note that by changing the MSR to reflect a district benchmark, SOA is no longer comparing Bert Ogden's sales to those in Santa Fe or Fayetteville, another location with a focus on outdoor activity. Sales in a snowy location are no longer part of the MSR. Thus, although Bert Ogden argues that "Imposing an MSR requirement on a dealer in the Rio Grande Valley that is based on market penetration in the 40 plus other markets in SOA's DFW Zone is arbitrary, unreasonable, and undermined by the false premise that 'segmentation'

[103] Tr. Vol. 9 at 2404.

[104] Tr. Vol. 8 at 2108.

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controls all other market factors,"[105] Bert Ogden's MSR is not calculated by looking at all those markets and has not been for several years. While SOA measured how well Bert Ogden was meeting its MSR compared to how other dealers in the DFW Zone were meeting theirs, Bert Ogden's MSR does not reflect the number of, for example, all-wheel vehicles in Santa Fe.

Because District 3 sales are used to calculate the MSR, Bert Ogden is essentially arguing that, for example, its 0.04 inches of annual snowfall negatively affects its ability to sell Subarus when compared to the area with the greatest amount of annual snowfall in the district, which is 0.24 inches. In sum, average annual snowfall amounts in District 3 range between 0.00 inches and 0.24 inches. The ALJs find this argument unpersuasive, particularly given that the District 3 dealership with 0.00-inch annual snowfall performed better than Bert Ogden.[106] Similarly, no evidence suggested there were any more ski destinations within 4 hours of San Antonio, Corpus Christi, or Bryan than there are within 4 hours of Pharr.

And these sales in similar climates are what distinguishes Bert Ogden from a business selling "upscale snow tires in Miami." Although all-wheel drive vehicles might be more useful in snowy climates, nothing in the record indicates that Subaru vehicles are as useless in the Rio Grande Valley as snow tires are in Miami.[107] In fact, many of the dealerships with an equivalent amount of snow, similarly far away

[105] Bert Ogden's Closing Argument at 21.

[106] Two other dealerships outside District 3 with 0.00 in annual snowfall also performed better than Bert Ogden.

[107] To the extent that Bert Ogden views Subaru vehicles in the Rio Grande Valley to be as useful as snow tires in Miami, it is unclear why Bert Ogden would want the franchise or want to expand to a second one.

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from skiing, and with young populations perform better than Bert Ogden. By focusing on the demographic and geographic differences within the entire zone, not just the district, and by highlighting differences that its own expert testified are not statistically significant, Bert Ogden has presented a case that it cannot be expected to sell Subarus. Indeed, the evidence shows that fewer Subarus are sold in District 3 than in Santa Fe, Fayetteville, or Austin. They did not, however, present persuasive evidence that it is significantly harder to sell Subarus in the Rio Grande Valley than in Corpus Christi, San Antonio, or Bryan.

In fact, the ALJs find it notable that Bert Ogden presented detailed evidence and testimony about education levels, snowfall, and income, but did not present any evidence related to dealer acts that could affect sales. Or rather, Bert Ogden did not present evidence or argument related to factors in its own control. And it did not attempt to contest the evidence—such as about the shared management structure, cross-selling, and responding to online inquiries about Subaru vehicles with advertising for Mazdas or Volvos—presented on this topic.

4. Inventory

As discussed previously, SOA dealers operate with a lower level of inventory than many other manufacturers' dealers do. Bert Ogden argues that SOA's method of allocating inventory and, consequently, the amount of inventory it received hampered its sales performance. The dealership argues that the Bert Ogden Group has had great success selling vehicles in the Rio Grande Valley by having a large inventory, in contrast to its Subaru dealership.

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a) Allocation

SOA allocates vehicles, by each of Subaru's nine carlines, on a monthly basis to all of its dealers.[108] Three factors impact allocation. First, 50% of the dealer's allocation calculation is based on the retailer's days' supply of each carline. The days' supply consists of vehicles the dealer actually has at the dealership and future units that SOA expects the dealer to have available within the next 30 days.[109] This method is commonly known as a balanced days' supply.[110]

Days' supply is the auto industry's method for measuring levels of inventory and is calculated by comparing how much of something is sold per day to how much of that item is in inventory. If a dealer sells one car per day and has 30 cars in inventory, the dealer has a 30 days' supply.[111] SOA tries to consider the average inventory level across an area and tries to keep retailers as close as possible to the average based on their relative sizes. Most auto companies use this type of system.[112] As SOA expert Jay Lytle described it, "the idea is that all the dealers that—will have similar days' supply so [the manufacturers] try and have [the dealers] all have the same days' supply such that if no more vehicles are allocated theoretically they would all . . . run out of vehicles on the same day."[113]

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[108] Tr. Vol. 2 at 544, 553.

[109] Tr. Vol. 2 at 545.

[110] Tr. Vol. 2 at 540-41.

[111] Tr. Vol. 2 at 541.

[112] Tr. Vol. 2 at 541-42.

[113] Tr. Vol. 8 at 1389.

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Second, 25% of the allocation is based on the retailer's sales share of its zone by carline. This calculation acknowledges that not every dealer is successful with every carline. A dealer's qualifying retail sales for a carline for the last three months is divided by the zone's qualifying sales for the same period for a particular carline.[114] And third, 25% of the allocation is based on the retailer's sales share of its zone for all carlines, for the last three months.[115]

These three factors all depend on dealer sales and sales share.[116] In deciding where to put product that needs to be sold, SOA wants to put its product where it can be sold efficiently.[117] These calculations mean that dealers can increase their allocations by increasing sales.[118] The allocation system would attempt to raise the dealer's inventory back up to the average. On the other hand, slow sales reduce allocations because a dealer already has a higher days' supply. This allocation methodology is sometimes called a "turn-and-earn" system,[119] and is similar to those of other manufacturers.[120]

As discussed previously, where SOA varies from other manufacturers or distributors is in the amount of inventory—or days' supply—it has and distributes. SOA operates with a lean inventory amount. As Mr. Adams put it, "we don't have

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[114] Tr. Vol. 2 at 547.

[115] Tr. Vol. 2 at 547-48.

[116] Tr. Vol. 3 at 622.

[117] Tr. Vol. 2 at 550.

[118] Tr. Vol. 2 at 550.

[119] Tr. Vol. 8 at 1976.

[120] Tr. Vol. 5 at 1385.

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extra vehicles sitting at the production facility. We have a very low days' supply of vehicles."[121]

Thus, efficient selling is an important part of obtaining inventory allocation. SOA presented evidence about sold orders, which is one method of efficient selling. Michael Teti, SOA's Director of Sales Planning and Analysis, testified that sold orders, which are when a retailer places an order for a customer of specific vehicle with specific features, usually make up around 10% of total SOA sales.[122] There are several benefits to a dealer from sold orders. In addition to giving SOA information about what product mix is best suited for the area, a sold order is in inventory for a shorter period of time, which can have a positive effect on the dealer's future inventory allocation.[123] Mr. Poston also testified about the importance of sold orders, calling them "a big part of . . . being efficient,"[124] and noted that the month before the hearing, SOA had a record number of sold orders going through its system.[125] Bert Ogden used the sold order system much less than other dealers.[126]

SOA also has a separate discretionary allocation for another set of vehicles, which are called Market Action Unit of Inventory (MAUI) vehicles. Mr. Teti testified that a MAUI unit is a vehicle that is manually allocated to a dealer and does not pass through the earned allocation calculation in the month it is allocated.

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[121] Tr. Vol. 2 at 351.

[122] Tr. Vol. 4 at 589.

[123] Tr. Vol. 3 at 589-90.

[124] Tr. Vol. 1 at 146.

[125] Tr. Vol. 1 at 145.

[126] Tr. Vol. 3 at 591.

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MAUI units are supplemental to a dealer's earned allocation.[127] Zone management has discretion to assign MAUI units to a dealer to address market needs. MAUI units are frequently used as loaner vehicles,[128] but can also be used as auto show and promotional vehicles; to provide inventory to new dealerships, facility relocations, or facility construction; for corporate vehicles; and for employee sales vehicles.[129]

MAUI units are sometimes provided to underperforming dealers to offer additional opportunity for the dealer to increase sales.[130] If MAUI units are provided and the dealer sells them quickly, under the earned allocation system the days' supply is decreased and sales share is increased, thereby increasing the earned allocation.[131] In contrast, if MAUI units are provided and the dealer does not sell them quickly, the dealer has a higher days' supply than other dealers, and the system will try to decrease that by reducing allocation.[132]

MAUI units are provided on a discretionary basis, and Mr. Teti emphasized that providing them on an ongoing basis would undermine SOA's allocation system.[133] To the extent that they are provided to help underperforming dealers, SOA's hope is that the dealers will cure their deficiencies and earn allocation

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[127] Tr. Vol. 2 at 564-65.

[128] Tr. Vol. 2 at 565.

[129] Tr. Vol. 3 at 624.

[130] Tr. Vol. 2 at 566-67.

[131] Tr. Vol. 2 at 567-68.

[132] Tr. Vol. 2 at 568.

[133] Tr. Vol. 2 at 567.

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organically.[134] Mr. Teti testified that providing a dealer with increased MAUI units creates over-allocation, causes inefficiency, and increases costs to the dealer. Moreover, it means those MAUI units cannot be provided to another dealer, which also increases inefficiency in the way the inventory is being used.[135]

From 2016 through January 2021, Bert Ogden received a total of 417 MAUI units, which was 18th largest number of total MAUI vehicles in the DFW Zone.[136] Bert Ogden argues that the dealership did not receive enough MAUI units until October and November 2020—after it received the termination notice—and that its increased sales at that time reflect that it finally had sufficient inventory.[137] Yet the evidence showed a fairly consistent number of MAUI units over the years—92 in 2016, 80 in 2017, 76 in 2018, 86 in 2019, and 78 in 2020.[138] As SOA points out, the evidence shows a dramatic sales increase beginning in August and September 2020, a time when it received no MAUI units.[139] SOA presented evidence that Bert Ogden received the third greatest number of MAUI units as a percentage of its allocation—as opposed to just raw numbers—in the DFW Zone.[140] Mr. Teti testified that Bert Ogden received a "meaningful amount of MAUI over a very long period of time."[141]

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[134] Tr. Vol. 2 at 567.

[135] Tr. Vol. 2 at 584.

[136] Bert Ogden Ex. 510.

[137] Bert Ogden Reply Brief at 41, 67.

[138] Bert Ogden Ex. 510.

[139] Bert Ogden Reply Brief at 41 (chart), 67; SOA Ex. 142 (showing the rolling 90-day sales rate dramatically increased in October 2020, which reflected sales in the period before October).

[140] Tr. Vol. 10 at 2458; SOA Ex. 187 at 21.

[141] Tr. Vol. 3 at 601-02.

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b) Bert Ogden's Inventory

Mr. Lytle testified that Bert Ogden regularly had a greater days' supply than other Subaru dealers. He noted that from late 2016 through the beginning of 2018, Bert Ogden had between 60- and 90-days' supply, which is the level Bert Ogden said it wanted to have.[142]

Mr. Lytle testified that Bert Ogden's sales increased significantly shortly after the termination notice without a significant change in the vehicles it had available. He noted that after SOA's allocation system caught up with the increased sales and provided additional vehicles to Bert Ogden, its sales dropped down again.[143] He added, "if the allocation of vehicles—the availability of vehicles was the determining factor in the dealership sales, I would expect to see in January and February those—the sales reported in those two months to be even higher than they were in October and November, and that's just not the case."[144] Mr. Lytle testified that every month, Bert Ogden had additional inventory that it could have used to make additional sales.[145]

c) Analysis

The evidence is clear that Bert Ogden generally had greater inventory—measured by days' supply—than other dealers in the Zone. The evidence is also

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[142] Tr. Vol. 8 at 1390.

[143] Tr. Vol. 5 at 1398.

[144] Tr. Vol. 5 at 1398.

[145] Tr. Vol. 5 at 1399.

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clear that—except for the year when Bert Ogden had 60 to 90 days' supply—this inventory amount was less than Bert Ogden wanted for its high-inventory strategy. The evidence set out the methods by which Bert Ogden could have organically grown its inventory but did not. The evidence also showed that Bert Ogden received a significant amount of MAUI vehicles, although less than it wanted, and it showed a dramatic increase in sales beginning in August and September of 2020, after the termination notice and before the receipt of MAUI units in October and November 2020.

The evidence does not show that Bert Ogden was treated any worse, in terms of inventory allocation, than any of the other dealers in the district or zone. In fact, it had a higher days' supply and received a significant number of MAUI vehicles. The evidence also shows that SOA and the Bert Ogden Group have fundamentally different concepts of dealer inventory. SOA operates on a lean-inventory model with a focus on efficient selling and inventory control. SOA has a limited number of vehicles; it does not have spare vehicles. The Bert Ogden Group, throughout all its dealerships, operates on a high-inventory model. The dealer may certainly choose to operate this way, but it cannot expect its chosen inventory model to override the distributor's nationwide inventory allocation system to accommodate its preferences. Nor can it use its preferred model to argue that its low sales are not relevant or should not be considered in the analysis. The ALJs do not find that Bert Ogden's lower sales than the rest of the district or zone are the result of SOA's inventory allocation.

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5. History of Success and Failure

Finally, Bert Ogden makes a series of arguments related to previous dealerships in the AOR, to its increased sales, and to the Bert Ogden Group's sales of other brands.

Bert Ogden argues that its sales should be measured by examining the fact that the many previous Subaru dealerships in the AOR have failed and that there was a history of turnover before it became the dealer.

The ALJs decline to find that a history of difficulty in maintaining a Subaru dealership is particularly significant in this factor. There was extensive testimony about the explosive growth in the Rio Grande Valley and in Subaru sales in general that distinguish a dealership that existed before 2009 from one today. Certainly, there is evidence that the Pharr AOR is not as great a market for Subarus as Santa Fe, Fayetteville, or Austin. But those markets are no longer counted for purposes of calculating Bert Ogden's MSR. The evidence does not suggest that the differences between the Pharr AOR and Corpus Christi or San Antonio are sufficiently significant to turn the dealership into the equivalent of a Miami snow-tire dealer.

As for its argument that SOA may not terminate a contract of a dealer whose sales are increasing, the ALJs find that argument unsupported by the caselaw

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Bert Ogden cites.[146] Certainly sales after termination notice are relevant, but the Code requires an examination of sales compared to the market, not sales compared to previous years. Also, the ALJs note that although there has been an uptick in total units sold, Bert Ogden remains below its MSR and even behind the reduced numbers for the 2017 sales performance addendum.

Finally, Bert Ogden argues that measuring its performance against the MSR is unfair because the rest of the Bert Ogden Group is so good at selling vehicles:

> In 2020, Bert Ogden Group sold over 30,000 new vehicles in the Rio Grande Valley- about one of every three cars sold. By relying on MSR as its only metric to evaluate sales by Bert Ogden Subaru, SOA effectively penalizes Bert Ogden Subaru for sales by other Bert Ogden dealerships in the same market—such as Nissan and Buick—which are successfully selling cars in the same MSR "segments" as Subaru. Bert Ogden Group dealerships are also selling other manufacturer's models that compete with Subaru models in the same segment at rates that substantially exceed the SOA assigned MSR market share in the DFW Zone for those non-Subaru models.[147]

The ALJs are not persuaded that the Bert Ogden Group's success at selling other brands should factor positively into an evaluation of its success in selling Subarus in the market. To the contrary, this argument seems consistent with one of

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[146] *See, e.g., All Star Imports, Inc. v. Mazda Motor of N. Am., Inc.*, SOAH Docket No. 608-19-6279.LIC, Proposal for Decision at 32 (recommending termination for reasons unrelated to sales figures; evidence of sales showed a dip in 2017, but an increase from 2019 until the time of hearing); *Bates Nissan, Inc. v. Nissan N. Am., Inc.*, SOAH Docket No. 608-14-3211.LIC at 26 (noting that overall sales increase leading up to the hearing "does not excuse past poor performance, it is an additional existing circumstance to be considered in the sales analysis").

[147] Bert Ogden's Closing Argument at 48-49.

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SOA's arguments in this proceeding: that Bert Ogden is not focused on selling Subaru vehicles.

6. Conclusion

The ALJs find that the factor of sales in relation to the market supports termination.

B. Investments and Obligations

The second statutory factor examines the investment and obligations of Bert Ogden's dealership.[148]

Bert Ogden lists the following as the investments and obligations in its Subaru dealership:

- Approximately $908,731,40 invested in the initial remodel of the Bert Ogden facility;[149]
- Approximately $99,133.19 invested in expanding the Bert Ogden parking lot;[150]
- Approximately $333,011.00 invested in equipment for the service shop;[151]
- Approximately $4,000,000.00 invested in electronic billboards for use by the entire Bert Ogden Group, including Bert Ogden;[152]

[148] Tex. Occ. Code § 2301.455(a)(2).

[149] Bert Ogden Ex. 301.

[150] Bert Ogden Ex. 302; Tr. Vol. 7 at 1935-36.

[151] Bert Ogden Ex. 303; Tr. Vol. 7 at 1937.

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- Approximately $10,441.31 invested in upgraded lighting at the Bert Ogden facility;[153]
- Approximately $2,500,000.00 invested in the form of service lifts and bays transferred from another Bert Ogden Group franchise to Bert Ogden;[154]
- Bert Ogden's lease obligates it to lease the premises through 2038;[155]
- Approximately $20,000.00 invested in an upgrade to Bert Ogden's Reynolds & Reynolds purchasing system to allow the customer sales experience to be less time-consuming;[156] and
- Approximately $1,000,000.00 contributed to charitable and educational institutions by Mr. Vackar on behalf of SOA's Subaru Loves Learning program.[157]

SOA challenges many of the items listed as expenses or obligations, arguing that some were not investments and also that some were not actually made by the dealership. SOA also points out some areas in which Bert Ogden has made no investments. For example, Bert Ogden does not own the land where the dealership sits. That land is owned by a Vackar family member and a trust.[158] They also point out that the lease for the dealership is really a sublease. Bert Ogden sublets the

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[152] Bert Ogden Ex. 304; Tr. Vol. 7 at 1938-40.

[153] Bert Ogden Ex. 306; Tr. Vol. 7 at 1941.

[154] Tr. Vol. 7 at 1942; Vol. 8 at 2072-74.

[155] Bert Ogden Ex. 309; Tr. Vol. 7 at 1942-43.

[156] Bert Ogden Ex. 305; Tr. Vol. 7 at 1903-07.

[157] Bert Ogden Ex. 308; Tr. Vol. 7 at 1852-53.

[158] Bert Ogden Ex. 309.

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dealership property from the Bert Ogden Group's Mazda dealership, who leases it from the trust.

SOA challenges the designation of Mr. Vackar's charitable contribution as an investment. The ALJs agree and find that while Mr. Vackar's charitable contributions are laudable, they cannot be considered an investment by the dealership for purposes of this statute.

SOA next agrees that the $10,441.31 expenditure for upgraded lighting; the $20,000 spent for the purchasing system upgrade; and the $99,133.19 spent on the parking lot expansion were paid by Bert Ogden. It seems clear that these items directly benefitted the dealership, as well. Nevertheless, SOA challenges whether these items may be considered investments because they were not reported on Bert Ogden's financial statements.[159] Ms. del Barrio testified that the absence is a result of the Bert Ogden Group's accounting practices: "we tend to fully expense everything, and at the end of the year if our CPA feels that things need to be brought back in and depreciated, then we do that at that time."[160] Regardless of whether Bert Ogden's accounting properly expensed, rather than capitalized, these items, it is undisputed that they were, in fact, paid. The ALJs find that these three items—totaling $129,574.50—are investments of the dealership.

SOA next argues that because many of these investments were not made by Bert Ogden, but rather by another Bert Ogden Group entity, they cannot be

[159] SOA Reply Brief at 25.

[160] Tr. Vol. 8 at 2010.

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considered when examining the dealership's investments. SOA cites a previous case, *Cecil Atkission Orange, LLC v. FCA US LLC*,[161] for the idea that an owner's investments in the dealership cannot be considered the dealership's investments. In *Cecil Atkission*, the dealer principal loaned his dealership money and the dealership counted those unsecured loan amounts as both dealer investment and dealer obligation. The ALJs rejected the principal's argument that his investments were the same as the dealership's.[162]

The remaining items Bert Ogden listed as its investments were not paid for by the Subaru dealership. Bert Ogden's Subaru dealership was not billed at all for any share of the $4,000,000.00 invested in electronic billboards.[163] Most of the original remodeling and the service bays were paid for by another Bert Ogden entity or entities.[164] It is unclear from the record who paid for the service equipment.

The ALJs do not think it accurately reflects the reality of the Bert Ogden Group's method of doing business to find that there has been little investment in Bert Ogden's Subaru dealership. The Bert Ogden facilities, for example, do not reflect the kind of neglect and lack of investment in *Atkission,* where, for years, a damaged sign was covered with a plastic bag and other dealership facilities were in

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[161] *Cecil Atkission Orange, LLC v. FCA US LLC*, SOAH Docket No. 608-15-4315.LIC.

[162] *Cecil Atkission*, Proposal for Decision at 24 (June 17, 2016).

[163] Tr. Vol. 7 at 1938. Even had Bert Ogden paid for some portion of the signs, the entire $4,000,000 of value from the signs would not be assigned to the Subaru dealership. The signs are shared by all of the Bert Ogden Group dealerships.

[164] *See, e.g.*, Tr. Vol. 8 at 2073 (describing how the Bert Ogden Group's GMC Buick body shop moved to a new service facility and provided its previous one to Bert Ogden).

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very poor repair, or in another case SOA cites, *Star Motors*, where facilities were described as "barely serviceable."[165]

But while money has been invested by someone into the dealership, or into items the dealership uses, the nature of those investments limits the harm that would be done to the dealership's investments in the case of termination. The dealership does not own the land or the building so would not lose that investment in the case of termination. The electronic signs advertise all the Bert Ogden Group dealerships. If termination occurs, there will be no harm to Bert Ogden—who did not pay for the sign—or the Bert Ogden Group related to those signs. Ms. del Barrio testified that the Bert Ogden Group would "not have immediate use for those service bays" if Bert Ogden's franchise is terminated.[166] But that is not the same thing as evidence that those bays would ultimately have no value to the group and its 23 other franchises. Similarly, although Bert Ogden has a lease with the Bert Ogden Mazda dealership, nothing suggests that the Mazda or Volvo dealerships on the same property could not use the space. The property would still have two functioning dealerships on it.

Thus, while Bert Ogden's actual investment is small, its parent company has made a sizable investment in items that have benefitted the dealership. However, because most of the investment has been made by other Bert Ogden Group entities,

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[165] *Star Houston, Inc. d/b/a Star Motor Cars v. Volvo Cars of North America, LLC*, SOAH Docket No. 608-16-4676.LIC, Proposal for Decision at 78 (April 2, 2019).

[166] Tr. Vol. 7 at 1942.

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there will not be much harm to the dealership from termination. The ALJs find this factor does not weigh in favor or against termination.

C. Injury or Benefit to the Public

The third statutory factor in determining whether there is good cause for termination requires consideration of any injury or benefit to the public.[167]

SOA argues that because of Bert Ogden's inability to provide a high level of customer service, terminating the dealership agreement and installing a new dealer would provide benefit to the public in the form of better customer service and increased customer satisfaction from a dealer fully committed to the Subaru brand.

Bert Ogden counters that customer satisfaction surveys show that customers are more satisfied with their experiences at Bert Ogden than SOA will acknowledge; therefore, there is no benefit to be gained by terminating the dealership agreement. Bert Ogden also contends that termination would cause significant long-term injury to the public because of the time it will take a new dealership to be approved and established, leaving customers with no local Subaru dealership for up to a year, and because "the confusion inflicted on the public will return" if a tenth different Subaru dealer is installed in the Rio Grande Valley.[168] Bert Ogden further argues that leaving the dealership agreement in place would continue to benefit Subaru's Rio Grande Valley customers because of the Bert Ogden Group's substantial resources and presence in the market.

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[167] Tex. Occ. Code § 2301.455(a)(3).

[168] Bert Ogden Closing Argument at 63.

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1. Evidence and Argument

SOA measures customer satisfaction through its Owner Loyalty Program (OLP), which is a set of surveys that measure customer satisfaction with purchase and service experiences. George Dubinsky is the national owner loyalty manager for SOA, a position he has held since 1998.[169] He is ultimately responsible for operation of the OLP.[170]

One purpose of the OLP is to provide retailers with information and tools to improve their stores and help acquire and keep customers.[171] SOA sends a purchase satisfaction survey to every customer who purchased or leased a new vehicle from any Subaru retailer. Any customer who had warranty claims or customer-paid service work performed at a retailer gets a service satisfaction survey.[172]

OLP surveys are scored on a five-point scale from poor (0 points) to very good (500 points) to extraordinary (1000 points).[173] Responses are tabulated separately for purchase and service experience, and converted into scores based on the number of responses. At the end of each quarter, SOA creates a report for each dealer that includes the dealer's OLP survey data for purchase and service for the past quarter. The report includes trend information, showing how a dealer's scores for a particular metric changed from quarter to quarter, and comparison data,

[169] Tr. Vol. 3 at 754.

[170] Tr. Vol. 3 at 754.

[171] SOA Ex. 25 at 4.

[172] Tr. Vol. 3 at 756.

[173] Tr. Vol. 3 at 760; SOA Ex. 23.

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which shows how a dealer ranks compared to other retailers in the same geographic region.[174]

SOA uses this comparative ranking system to identify retailers that need help improving the customer service experience at their store, in furtherance of its goal of providing the best customer service experience possible.[175] Mr. Dubinsky testified that for as long as he has been involved with the OLP, it has been SOA's practice to look at the dealer's rank in evaluating OLP scores.[176]

SOA offered several of Bert Ogden's quarterly OLP reports going back to 2017, as well as various charts summarizing OLP. Those reports demonstrate that Bert Ogden has consistently ranked lower than other dealers in the DFW Zone in purchase satisfaction. From 2017-2021, Bert Ogden ranked either last or in the bottom three of DFW Zone dealers in this category based on OLP survey responses: 42 of 42 (2017), 44 of 46 (2018), 43 of 45 (2019), and 44 of 44 (2020).[177] Regarding service satisfaction, in all but two quarters from 2019 through the third quarter of 2021, Bert Ogden's scores were lower than every other dealer in the DFW Zone.[178]

SOA also presented evidence of unsolicited negative reviews left by customers on web sites including Google, Facebook, and Yahoo. One customer

[174] SOA Ex. 25.

[175] Tr. Vol. 3 at 761.

[176] Tr. Vol. 3 at 761.

[177] SOA Exs. 51 at 17; 52 at 21; 53 at 23; 54 at 23; 42B.

[178] SOA Exs. 53 at 46; 54 at 44; 55 at 45.

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complained that it took four months to get the title for the vehicle she purchased at Bert Ogden because, she was told, there was a lien on her new vehicle.[179] Another customer complained that the remaining loan on the vehicle the customer traded in was not paid off by Bert Ogden in a timely manner, causing the customer concern about the potential negative impact on the customer's credit scores.[180]

SOA further argues that the number of registrations within the Pharr AOR of Subaru vehicles that were purchased from dealers other than Bert Ogden also shows customer dissatisfaction with Bert Ogden.[181] According to the data, 18% of new Subarus registered in the Pharr AOR were purchased from a dealer other than Bert Ogden. SOA says this shows that 18% of potential buyers chose to purchase their Subaru vehicle from another dealer at least 150 miles away because of their dissatisfaction with Bert Ogden.[182]

Bert Ogden counters that even if its OLP survey scores resulted in rankings that were low relative to other dealers, Bert Ogden customers still scored the dealership closer to "extraordinary" than "very good," demonstrating a high level of customer satisfaction.[183] The data show that from 2017-2020, Bert Ogden achieved the following purchase experience satisfaction scores: 892 (2017), 776 (2018), 810 (2019), 759 (2020 quarters 1 and 2), and 785 (2020 year-end).[184] On the

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[179] SOA Ex. 49 at 4.

[180] SOA Ex. 47 at 10, 16, 17.

[181] SOA Closing Argument at 45.

[182] SOA Closing Argument at 45.

[183] Bert Ogden Closing Argument at 45, 47.

[184] SOA Ex. 43.

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0-1000 scale put in place by SOA, these scores are closer to "extraordinary" than "very good." According to Bert Ogden, these scores show that Bert Ogden has "consistently received 'extraordinary' purchase and service 'overall satisfaction' scores."[185] Because of these scores, Bert Ogden argues that comparative rankings should be ignored in favor of evaluating customer satisfaction by scores attained, without comparing one dealer to any other.

Not only does comparatively ranking dealers ignore the true results of the surveys, Bert Ogden says, such rankings are unfair because one dealer will always be ranked last even if they achieve high scores. Like the game of musical chairs, one dealer will always finish last and be forced out of the game after every round.[186] This "last dealer is out" concept is not mentioned in the dealership agreement or in documentation from SOA explaining the OLP.[187]

Regarding unsolicited online customer reviews, Bert Ogden contends that the reviews and comments highlighted by SOA were cherry-picked for their negativity and that it is not possible to confirm that the reviewers who left the comments were actual Bert Ogden customers. Some of the comments were flagged as negative, even when they included some positive feedback.

In terms of injury to the public, Bert Ogden argues that customers in the Rio Grande Valley will endure significant hardship if the Bert Ogden dealership

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[185] Bert Ogden Closing Argument at 51.

[186] Bert Ogden Reply Brief at 71-72.

[187] Bert Ogden Reply Brief at 76.

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agreement is terminated. The complex process of installing a new Subaru dealer in the Rio Grande Valley would leave customers without a local dealership to service their vehicles for a lengthy period. Local Subaru owners would have to drive to the next nearest dealerships in Corpus Christi or San Antonio for service until a new Subaru dealer is vetted and established, which Bert Ogden says could take up to a year.

As for the benefit of leaving its dealership agreement in place, Bert Ogden argues that the organizational strength of the Bert Ogden Group puts it in a better position to protect the dealership and the public during times of economic uncertainty, such as the COVID-19 pandemic, economic recessions, and periodic border crises.[188]

2. Analysis

As an initial matter, the ALJs do not find that the number of Subaru vehicles purchased outside the Pharr AOR but registered within the Pharr AOR is relevant to this analysis. There was no evidence presented that any of the out-of-AOR purchasers ever visited Bert Ogden, let alone had a bad experience there, or that their decision to purchase from another dealer had anything to do with Bert Ogden.

The other evidence presented in support of this factor, however, weighs in favor of finding good cause for termination. Most persuasive of the evidence relied on by SOA is the consistently low OLP rankings achieved by Bert Ogden. The

[188] Bert Ogden Closing Argument at 51.

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scores objectively place Bert Ogden well below average in the DFW Zone for purchase satisfaction from at least 2017-2021, with little variability. At times, Bert Ogden's purchase satisfaction scores have been the worst of all retailers in the zone. In service satisfaction, Bert Ogden also performed below the average for the zone.

It is true that Bert Ogden's OLP scores tend to be closer to extraordinary than very good. Bert Ogden's disagreement with SOA's method of using comparative rankings, however, is not a reason to discount it as a useful instrument for identifying the lowest performing retailers so that SOA can help those retailers improve the customer service experience. This is a legitimate goal of the OLP program, and one that would not be served by review of a dealer's scores in isolation.

SOA has used OLP comparative rankings since at least 1998. According to Mr. Dubinsky, OLP scores are tabulated on a quarterly basis and reports are created for the dealers that include comparative rankings. As discussed in the OLP Navigation Guide, a document available to dealers, the reports set forth comparisons between a dealer and the zone across several categories, and the dealers are encouraged to consider how their scores and trends compare to the scores and trends of the zone overall. SOA's use of comparative rankings is not a recent development, and Bert Ogden should not be surprised that their consistently low rankings would eventually have some consequence.

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For these reasons, the ALJs determine that SOA's use of comparative rankings is appropriate and reasonable, and Bert Ogden's consistently low rankings demonstrate that termination of the dealership agreement would benefit the public. Currently, the Rio Grande Valley is being served by a Subaru dealership that, its customers say, provides a below-average customer service experience. Although SOA did not present evidence that another dealer would perform at a higher level, Bert Ogden's consistently low OLP rankings call into question how significant a benefit the dealership provides to its customers. Similarly, even though Bert Ogden is part of the Bert Ogden Group—a large, established organization in the Rio Grande Valley—the ALJs do not find that this provides more than an abstract benefit to the public, and does not outweigh the tangible benefit the public would experience from a new Subaru dealer.

While there is the potential for injury in the form of inconvenience to current Subaru owners and potential customers if its dealership agreement is terminated, this is insufficient reason to leave Bert Ogden's dealership agreement in place. SOA has indicated its intent to quickly replace the dealership, not eliminate it, and presented evidence that the transition would not take as long as Bert Ogden warns. Any disruption to customer service would be temporary.

After considering the arguments and evidence, the ALJs find that on balance the benefit of a new Subaru dealer outweighs the short-term inconveniences that current Subaru customers and owners might experience while a new dealer is installed. The ALJs further find that there would be little benefit to leaving Bert Ogden's dealership agreement in place considering the dealership's poor sales

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and service. For these reasons, the ALJs find that the injury or benefit to the public factor weighs in favor of terminating the dealership agreement.

D. Adequacy of Service Facilities, Equipment, Parts, and Personnel

The fourth statutory factor requires consideration of the "adequacy of the dealer's service facilities, equipment, parts, and personnel in relation to those of other dealers of new motor vehicles of the same line-make."[189]

1. Adequacy of Service Facilities

Regarding adequacy of service facilities, SOA said in its opening statement that it "doesn't take issue with Bert Ogden's current facility," and that Bert Ogden's service facility is "acceptable currently."[190] In its closing brief, however, SOA argues that the facilities are inadequate based on negative customer feedback about the small size of the service waiting area and the unfriendly nature of some service staff members. Regardless of these complaints, the ALJs find that there is no evidence that Bert Ogden's service facilities are inadequate.

2. Adequacy of Service Parts and Equipment

SOA next argues that Bert Ogden's parts department lacks adequate equipment and does not have sufficient inventory of parts and accessories to efficiently complete vehicle maintenance services. Bert Ogden counters that SOA did not offer any evidence that "the number of [sic] selection of parts maintained

[189] Tex. Occ. Code § 2301.455(a)(4).

[190] Tr. Vol. 1 at 21-22.

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by Bert Ogden Subaru violated any franchise requirement or SOA policy" and that there was no evidence or testimony that addressed the statutory factor of the adequacy of Bert Ogden's equipment and parts in relation to other dealers.[191]

SOA presented evidence of Bert Ogden's parts and equipment relative to similar-sized dealers in the zone. As part of its evidence, SOA discussed what are called vehicles in operation, or VIOs. A VIO is a vehicle seven model years old or newer that is still in operation, being driven on the road. The number of VIOs in District 3 has grown over the last several years.[192] VIOs represent service opportunity in the automotive industry because they are the vehicles most likely to return to the dealership for service.[193] One way to look at parts is to measure how many parts and accessories a dealer has on hand in inventory per VIO. This is a useful metric relating to customer service because if a dealership has inventory on hand, the service or repair can be performed more quickly than if the parts must be ordered.[194]

Using information reported by the dealers to SOA, Mr. Lytle analyzed Bert Ogden's parts and accessories inventory per VIO, service equipment at cost, and service equipment at cost per VIO relative to other dealers of similar size in the DFW Zone. From 2017-2020, Bert Ogden almost always had less inventory on

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[191] Bert Ogden Reply Brief at 86-86.

[192] Tr. Vol. 5 at 1364-65; Tr. Vol. 4 at 1014-15. VIOs were also called UIOs or units in operation by Hector Flores. Tr. Vol. 4 at 1014-15.

[193] Tr. Vol. 5 at 1364.

[194] Tr. Vol. 5 at 1364-65.

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hand per VIO than similar-sized dealers in the DFW Zone.[195] While other dealers reported an average of $35-$53 worth of inventory per VIO over that four-year period, Bert Ogden never reported having more than $40 of inventory per VIO, and at times had less than $10 of inventory per VIO.[196]

The same data demonstrates that from mid-2018 through mid-2020, as the number of VIOs in District 3 was increasing, Bert Ogden's inventory per VIO was decreasing yearly, in contrast to other dealers' increase in inventory per VIO.[197] In mid-July 2018 Bert Ogden reported about $40 of inventory per VIO, which dropped to less than $20 per VIO by the beginning of 2020.[198] Similar-sized dealers were reporting, on average, $40-$50 or more worth of inventory per VIO. Once the termination notice was served in August 2020, Bert Ogden's inventory per VIO began to trend upward until it exceeded the inventory level of same-sized dealers in December 2020.[199]

Mr. Lytle found similar but more drastic differences in Bert Ogden's service equipment in relation to other dealers. Bert Ogden reported having far less service equipment at cost relative to other dealers of similar size in the DFW Zone.[200] Bert Ogden reported less than $5,000 worth of equipment at cost in December 2020, while comparison dealers reported just over $300,000 in service

[195] SOA Ex. 186 at 51; Tr. Vol. 5 at 1365.

[196] SOA Ex. 186 at 51.

[197] SOA Ex. 186 at 51.

[198] SOA Ex. 186 at 51.

[199] SOA Ex. 186 at 51.

[200] SOA Ex. 186 at 52.

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equipment.[201] Similarly, Bert Ogden reported "substantially less" service equipment per VIO than the comparison dealers, around $10 per VIO relative to about $80-$140 reported by comparison dealers.[202]

Bert Ogden argued that SOA did not present evidence of the adequacy of service equipment or parts in relation to other dealers, saying that "no discussion was made to compare Bert Ogden Subaru facilities or equipment," and that SOA's arguments were "limited and insufficient."[203] Bert Ogden also pointed out at the hearing that Mr. Lytle had not personally visited Bert Ogden and, therefore, did not know what equipment specifically was on site at the dealership.[204] Mr. Lytle conceded as much, and testified that the comparisons he made between Bert Ogden and other similar-sized dealerships were based on what the dealers reported to Subaru.[205]

3. Adequacy of Service Personnel

Bert Ogden argues that SOA has not established the inadequacy of service personnel because it did not introduce evidence regarding service personnel at other dealers in the DFW Zone. It also argues that the number of service employees, and their qualifications and certifications, complied with SOA's

[201] SOA Ex. 186 at 52.

[202] SOA Ex. 186 at 53.

[203] Bert Ogden Reply Brief at 86.

[204] Tr. Vol. 5 at 1416-17.

[205] Tr. Vol. 5 at 1416-17.

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Minimum Standards and Operating Guidelines (MSOGs) and the dealer's obligations.

SOA argues that high levels of turnover, untrained staff, and staff who were not focused specifically on the Subaru brand contributed to the inadequacy of Bert Ogden's service personnel.

Hector Flores, District 3's District Service and Parts Manager, testified that Bert Ogden's parts and service department had a high level of turnover that was "very uncommon" for District 3 dealers.[206] The constant turnover can negatively impact the parts department because it can lead to delays in providing service when a new employee is not yet familiar with the Subaru brand and processes.[207]

Bert Ogden also lacked dedicated staff in the parts and service department. Bert Ogden had four or five service managers in a period of three years, some of whom also held important positions with significant responsibilities at other Bert Ogden Group dealerships.[208] At the time of the hearing, Bert Ogden had a dedicated service manager, but he had only been in that position for two weeks.[209] Mr. Flores testified that Bert Ogden has never had a dedicated parts manager, and that other dealers in District 3 have Subaru-dedicated parts and service staff.[210]

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[206] Tr. Vol. 4 at 1011-12.

[207] Tr. Vol. 4 at 1002.

[208] Tr. Vol. 4 at 1006-07.

[209] Tr. Vol. 4 at 1007-08.

[210] Tr. Vol. 4 at 1009-10, 1012.

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As VIOs have continued to increase, Mr. Flores said, other dealers have added more technicians and service advisors, and have Subaru-dedicated employees in key positions such as service manager and parts manager.[211] On the other hand, Bert Ogden has not made changes to its service operations in response to the increase in VIOs:

> Bert Ogden is always playing catch-up . . . and they can't seem to catch up, you know. Turnover in service managers, turnover in parts managers, no focus on the brand; when I say 'no focus,' they don't have a dedicated parts manager, service manager position. They are not progressing. They are trying to catch up.[212]

Finally, SOA argues that Bert Ogden's low OLP service satisfaction scores and rankings are evidence of the inadequacy of the dealership's service personnel, because inadequate personnel can contribute to an unpleasant dealership service experience.

In contrast, Bert Ogden argued that the evidence presented by SOA did not compare the adequacy of Bert Ogden employees with employees at other dealerships. Bert Ogden relies on SOA's MSOGs to show that its parts and service department staffing levels have complied with the personnel requirements set out by SOA since at least 2019.[213] The MSOGs are annual letters that, among other things, list SOA's personnel requirements and then indicate whether the dealership

[211] Tr. Vol. 4 at 1015.

[212] Tr. Vol. 4 at 1016.

[213] Bert Ogden Closing Argument at 53-55.

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is complying with them. [214] The MSOGs in evidence show that from 2017-2021, Bert Ogden either met or exceeded the requirements for having a certified Subaru service manager, a certified Subaru service advisor, and the required number of fully-trained service technicians. On the other hand, those same reports show that Bert Ogden did not have an exclusive service manager or an exclusive service advisor.[215]

4. Analysis

The evidence is clear that in relation to other dealers of new cars of the same line-make, Bert Ogden's service equipment, parts, and personnel are inadequate. Multiple SOA witnesses testified about these topics, including one of SOA's experts who also conducted a comparative analysis of the equipment and parts inventory on hand at Bert Ogden. Mr. Lytle reviewed service parts inventory information, as well as the service equipment information reported to SOA by Bert Ogden and other dealers. Mr. Lytle opined that Bert Ogden reported inadequate service parts and equipment in relation to other Subaru dealerships.[216]

Bert Ogden did not challenge the accuracy of the data Mr. Lytle reviewed, which came from dealer financial statements provided by Bert Ogden to SOA, and instead argued that he was not aware of the actual equipment on hand because he had never been to the dealership. If indeed Bert Ogden had more service

[214] Tr. Vol. 2 at 336.

[215] SOA Ex. 15 at 3; 16 at 3; 17 at 3; 18 at 3; 19 at 3.

[216] SOA Ex. 186 at 6.

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equipment on site than it reported to SOA, it is unclear to the ALJs why Bert Ogden underreported its equipment year after year.

Regarding parts inventory, Bert Ogden argued that the comparative data relied on by SOA was too limited to demonstrate whether the service parts inventory was adequate. The ALJs disagree and find that four years' worth of data showing monthly inventory per VIO for Bert Ogden and comparison dealers is not "spotty evidence" as Bert Ogden alleges. Similarly, Mr. Lytle also reviewed four years' worth of dealer reports of service equipment at cost, and service equipment at cost per VIO. This data is more than enough information to establish that Bert Ogden's service parts and equipment is inadequate in relation to other dealers.

SOA also established that Bert Ogden did not have adequate service personnel. Mr. Flores credibly testified that in relation to other dealers in District 3, Bert Ogden had higher employee turnover and fewer Subaru-dedicated employees, especially in key positions. In addition, while other dealerships increased parts and service staffing in response to increasing VIOs, Bert Ogden did not.

Curiously, Bert Ogden points to the MSOGs for 2017-2021 as evidence that the dealership complied with required staffing levels, but those MSOGs also show consistent deficiencies in service personnel. Instead of having an exclusive service manager and an exclusive service advisor as required, the MSOGs indicate that the employees who filled those positions at Bert Ogden were shared with other

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dealerships. Mr. Mauldin, who became general manager in November 2018,[217] testified that the "shared" designations on the MSOGs from 2019-2021 are incorrect because two employees, who are exclusive to Bert Ogden, have filled those roles.[218] Although the ALJs do not necessarily find Mr. Mauldin's testimony less credible, it is remarkable that Bert Ogden would receive inaccurate MSOGs from SOA on a yearly basis but make no attempt to correct them.

Turning to Bert Ogden's low OLP service satisfaction scores, the dealership argues that the focus should be on the scores it achieved, which it says were closer to extraordinary than very good and, therefore, demonstrate a high level of customer satisfaction. The ALJs would point out that this statutory factor requires comparison of the adequacy of Bert Ogden's service personnel in relation to other dealers. Bert Ogden's OLP scores alone do not provide that comparison, so they must be considered along with Bert Ogden's ranking as compared to other dealers in the DFW Zone. The evidence shows that Bert Ogden consistently ranked lower than the zone average in service satisfaction, and its rank has been trending downward since 2017.[219] Even if the ALJs considered Bert Ogden's OLP service scores and ignored ranking, the evidence shows that from 2019 through the third quarter of 2021, Bert Ogden's scores were lower than the zone average scores every quarter except two.[220]

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[217] Tr. Vol. 7 at 1680.

[218] Tr. Vol. 7 at 1689-94.

[219] SOA Ex. 186 at 56.

[220] SOA Ex 53 at 46; 54 at 44; 55 at 45.

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High turnover, lack of Subaru-exclusive employees, and low OLP service satisfaction rankings relative to other dealers in the zone altogether provide compelling evidence that Bert Ogden's service personnel are inadequate relative to other dealers.

For these reasons, the ALJs find that SOA did not establish that Bert Ogden's service facilities were inadequate, but did prove that Bert Ogden's service equipment, parts, and personnel did not compare favorably with other Subaru dealers. For these reasons, the ALJs determine that this factor weighs in favor of termination.

E. Whether Warranties are Being Honored by the Dealer

The next factor in evaluating whether there is good cause for termination, is "whether warranties are being honored by the dealer."[221]

SOA argues that Bert Ogden has a policy under which it refuses to service Subaru vehicles that are over 10 years old and/or that have greater than 100,000 miles, and that this policy, combined with dissatisfaction with the service experience at Bert Ogden, "demonstrates that the dealership is failing to honor Subaru warranties by turning away warranty work on certain vehicles" and that it fails to perform competent repair work.[222]

[221] Tex. Occ. Code § 2301.455(a)(5).

[222] SOA Closing Argument at 62.

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Bert Ogden argues that it has no such policy of refusing to perform warranty work under any circumstance, including on vehicles of a certain age or mileage, and that the dealership has never refused to provide service on a vehicle for any reason, including vehicle age or mileage.

1. Evidence

SOA introduced evidence that it says shows that Bert Ogden refuses to service vehicles of a certain age or mileage. This evidence was based on a June 2021 mystery shop call in which a mystery shopper contacted Bert Ogden and requested recall work on a 2005 Subaru vehicle with more than 100,000 miles.[223] In a mystery shop, a third-party company initiates contact with a dealership, in this case by telephone, and makes an inquiry. The mystery shop calls are recorded and then reviewed and scored by Mr. Yannella, who then forwards the calls to the district managers for further action.[224] The mystery shop tool is used by SOA to observe how dealerships interact with customers, oversee dealership customer service, and identify operational deficiencies.[225]

When the mystery shopper inquired about getting recall work done on a 2005 Subaru with over 100,000 miles, she was informed by a Bert Ogden employee that Bert Ogden does not service vehicles that are more than 10 years old or that have more than 100,000 miles.[226]

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[223] Tr. Vol. 4 at 863; SOA Ex. 135.

[224] Tr. Vol. 4 at 863.

[225] Tr. Vol. 4 at 865.

[226] Tr. Vol. 4 at 863-64.

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Concerned about this policy, Mr. Yannella forwarded the recording of the call to Mr. Mauldin, Bert Ogden's general manager. Mr. Mauldin responded that Bert Ogden prefers not to service vehicles with more than 100,000 miles because the parts can be "brittle" and may break.[227] Mr. Mauldin told Mr. Yannella that Bert Ogden would make an exception for vehicles purchased at Bert Ogden or for service work involving a recall.[228]

According to Mr. Yannella, the vehicle at issue could have been under a warranty if there had been a warranty extension or an extended service agreement in place.[229] Mr. Yannella believed the exclusionary service policy to be a widespread practice at Bert Ogden and that the mystery shop call was not just a one-time occurrence.[230]

Mr. Flores testified that based on the mystery shop call, he understood Bert Ogden to have a policy of refusing to service vehicles of a certain age or mileage.[231] When he followed up with the dealership's management, he was assured that the recall work should have been performed regardless of the vehicle's mileage.[232]

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[227] Tr. Vol. 4 at 864.

[228] Tr. Vol. 4 at 864.

[229] Tr. Vol. 4 at 866.

[230] Tr. Vol. 4 at 865.

[231] Tr. Vol. 4 at 1022.

[232] Tr. Vol. 4 at 1022-23.

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SOA also pointed to the high volume of customer complaints about Bert Ogden's service department and consistently low service OLP scores as further proof that the dealership is failing to honor Subaru warranties.[233] Average OLP rankings in service satisfaction show that since 2018, Bert Ogden's service satisfaction scores have been trending downward. In 2017, Bert Ogden's average quarterly service satisfaction score was 917.[234] In 2018 that dropped to 819[235] and in 2019 and 2020 the average quarterly service satisfaction dropped again to 805 and 795, respectively.[236]

Bert Ogden counters that there is no exclusionary service policy and that there is no evidence of any warranty claim not honored by Bert Ogden. Mr. Mauldin testified that the dealership does not have a policy of refusing to perform warranty work on vehicles based on age or mileage and that he is not aware of any instance when Bert Ogden refused to service a vehicle.[237] He explained that when Mr. Yannella informed him of the mystery shop call, he determined that the employee was recently hired and provided inaccurate information to the caller. The employee was counseled about his mistake and there have been no issues since. Aside from the mystery shop call, Mr. Mauldin said, he is not aware of any situation when a customer was told that service would not be performed because of the age or mileage of the car.[238]

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[233] SOA Closing Argument at 60-62.

[234] SOA Exs. 51 at 33; 186 at 56.

[235] SOA Exs. 52 at 40, which includes data only from the third and fourth quarters of 2018; 186 at 56.

[236] SOA Exs. 53 at 46; 54 at 44; 186 at 56.

[237] Tr. Vol. 7 at 1770-71, 1826-27.

[238] Tr. Vol. 7 at 1770-71.

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Ms. del Barrio went even further and testified that Bert Ogden has no such policy of refusing to perform either warranty work or recall work, without regard to the age or mileage of the vehicle.[239] Mr. Flores said he was unaware of any instance of Bert Ogden declining to perform warranty work.[240]

2. Analysis

The evidence presented in support of this statutory factor does not establish that Bert Ogden has refused to honor warranties. Instead of citing specific examples of warranty work that Bert Ogden failed or refused to perform, SOA contends that the exclusionary service policy allegedly in place at Bert Ogden coupled with low service satisfaction scores means that the dealership refuses to perform warranty work, including on older, high-mileage Subaru vehicles covered under warranty extensions or extended service agreements. The ALJs disagree.

To establish the existence of the exclusionary policy, SOA relies on the mystery shop call from June 2021. Mr. Mauldin, however, credibly testified that the Bert Ogden employee who took the call was a new employee who was mistaken. The mistake was addressed through additional training and there is no evidence that something similar has happened again. In addition, Mr. Mauldin and Ms. del Barrio both testified that Bert Ogden has no such policy. Though Mr. Yannella and Mr. Flores both testified that they understood Bert Ogden to have an exclusionary service policy, their knowledge was based on information related to the mystery

[239] Tr. Vol. 7 at 1875.

[240] Tr. Vol. 4 at 1097-98.

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shop call and neither testified to having any other independent knowledge of the policy. The ALJs, therefore, find that the evidence is insufficient to establish the existence of an exclusionary service policy.

Similarly, the ALJs do not find that customer complaints about the Bert Ogden service department support a finding that the dealership is not honoring warranties. Of the customer complaints cited by SOA in its brief, only one involved warranty work and that customer stated that Bert Ogden performed the work once under the original warranty and once under an extended warranty. None of the customer complaints cited by SOA in its brief involve Bert Ogden's refusal to perform service on vehicles more than 10 years old or with more than 100,000 miles.

To that point, it is significant in this analysis that SOA was unable to cite any specific examples of Bert Ogden's refusal to perform warranty work, either from customers, SOA witnesses, or Bert Ogden employees. This is a notable omission considering that Bert Ogden Group has had a Subaru dealership since 2009. If Bert Ogden were customarily and consistently refusing to honor valid vehicle warranties, the ALJs would expect there to be specific examples, especially if it occurred over a period of years, as alleged by SOA.

SOA has not shown by a preponderance of the evidence that Bert Ogden has refused to honor warranties. The ALJs conclude that this factor does not weigh in favor of termination.

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F. Compliance with the Franchise

The next statutory factor to be considered in determining good cause for terminating a dealership is "the parties' compliance with the franchise, except to the extent that the franchise conflicts with [Code chapter 2301]."[241]

SOA argues that Bert Ogden materially breached the Dealership Agreement and the Sales Performance Addendum in three main ways. First, SOA argues that Bert Ogden failed to meet the express standards set out in the three-year 2017 Sales Performance Addendum. Second, it argues that Bert Ogden's failure to meet its customer service obligations constituted a material breach. Third, it argues that Bert Ogden breached the contract by failing to comply with the minimum staffing requirements contained in the MSOGs.

Bert Ogden argues that the only provision of the 2017 Dealer Agreement it breached was the Sales Performance Addendum but argues that compliance was unfeasible "in large part by the actions of SOA" in not providing it sufficient inventory.[242] Relatedly, Bert Ogden argues that that SOA represented to it that MSR was a "long-term goal," and that compliance was not expected.[243] Bert Ogden also argues that comparative OLP rankings are not a required term of the franchise. Bert Ogden argues that SOA misrepresents the number of certified and exclusive employees at Bert Ogden. Bert Ogden also argues, for the first time in its reply

[241] Tex. Occ. Code § 2301.455(a)(6).

[242] Bert Ogden Closing Argument at 58-59.

[243] Bert Ogden Closing Argument at 15; Bert Ogden Reply Brief at 55.

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brief, that SOA breached the agreements by failing to give it notice of non-compliance with the contract and an opportunity to cure.[244] Because Bert Ogden did not raise any allegations regarding SOA's possible non-compliance with the Dealer Agreement until its reply brief, the ALJs will not consider them.

1. Failure to Comply with the Sales Performance Addendum

The 2017 Sales Performance Addendum set out three years of step-up sales requirements for Bert Ogden. The modified sales requirements for each of those years were 337 sales in June 2018, 516 in June 2019, and 602 in June 2020.[245] Bert Ogden's actual sales at the end of each one-year period were 327 in June 2018, 338 in June 2019, and 358 in June 2020.[246] Thus, although Bert Ogden had modest increases in each of those years, the dealership did not meet any of the modified requirements.

Bert Ogden argues that it almost reached the Sales Performance Addendum numbers in the first year. It describes its first-year performance as having "sold 327 vehicles in the July 1, 2017–June 30, 2018 time frame against the Sales Performance target of 337 (97%)."

Bert Ogden next argues that it was not allocated sufficient inventory to meet the Sales Performance Addendum even had it sold its inventory at a satisfactory

[244] Bert Ogden Reply Brief at 89-90.

[245] The Sales Performance Addendum expressed these numbers in terms of percentages of the MSR. The MSR for those years was 673 for June 2018, 880 for June 2019, and 871 for June 2020.

[246] SOA Ex. 172 at 3.

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sales efficiency. This argument is based solely on a single sentence in an internal SOA email noting that Bert Ogden "would have sold 124, 142, and 124 more units during year 1, year 2 and year 3 respectively if they would have just achieved average zone sales efficiency. (Attached are the calculations by month.)"[247]

It is true that selling 124 more units during the first year of the Sales Performance Addendum would have meant that Bert Ogden significantly exceeded the first-year addendum amount (instead of not-quite meeting it). However, selling 142 more vehicles than were actually sold in year two would have put Bert Ogden 16 vehicles below its second-year target.[248] And in year three, selling 124 more vehicles would have still left Bert Ogden well behind the third-year goals.

Although the calculations are not attached to the exhibit, it seems to the ALJs that these calculations must be made by taking actual inventory amounts multiplied by the average zone sales efficiency rate. The calculations do not seem to reflect the greater inventory allocation amounts Bert Ogden would have received in years two and three had it actually sold 124 more vehicles in the first year of the Sales Performance Addendum, as that would be extraordinarily difficult to calculate. What is more, those numbers do not make sense if they include the increased inventory Bert Ogden would have earned if it had, for example, sold an additional 124 vehicles in the first year. If that calculation included the additional inventory, the number of hypothetical additional sales (based on average sales

[247] Bert Ogden Ex. 332 at SOA004285.

[248] Bert Ogden was actually 178 units below that second-year amount. Also, selling 142 more vehicles than were actually sold in the second year would have put Bert Ogden at 97% of its goal, a percentage it contends is largely the same as meeting the goal when discussing its first-year performance.

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efficiency) would have been significantly higher the second year than the first because of the increased inventory. The ALJs do not interpret this line in an email to be, as Bert Ogden contends, an admission that SOA used inventory allocation to hold Bert Ogden back from meeting its sales goals.

Relatedly, to the extent SOA argues that failure to meet MSR was a breach of the dealership agreement, Bert Ogden argues that it cannot be held to its MSR number because it was informed that MSR was merely a long-term goal, not an enforceable standard. In making this argument, Bert Ogden relies heavily on a statement from Mr. Yannella in a June 2019 Contact Report—an internal memorandum of SOA conversation or visit with a dealer—indicating that, for Bert Ogden, obtaining MSR was a long-term goal.[249] This statement reads:

> Retailer states that they'd like to know [if] 40 units per month is the number that we keep asking them to perform at. Advised that this is based on their current SOSA[250] information and that the number we want them hitting is actually much larger than that, but we need them to hit 40 units per month first. MSR is currently at 71 units per month, based on April 2019 RYTD registration data. Reminded them that we are providing them the additional inventory to hit 40 units per month and that our long-term goal is to be at 100% MSR.[251]

Bert Ogden argues Mr. Yannella's statement means that SOA essentially waived any requirement for Bert Ogden to reach MSR. Nevertheless, Mr. Yannella

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[249] SOA Ex. 70 at 2.

[250] The Sales Opportunity / Segment Analysis Report, or SOSA, is an internal SOA report showing what market competitors have registered in the AOR and the dealer sales related to those registrations. Tr. Vol. 2 at 355.

[251] SOA Ex. 70 at 2. Forty units per month—or 480 per year—was a significantly higher number of vehicles than Bert Ogden was selling throughout the duration of the Sales Performance Agreement.

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explained that when he referred to "long-term goal" he was not saying that MSR did not matter, but was explaining the need to take incremental steps to reach MSR:

> So you're ultimately going to sell 40, and then you're going to get the inventory to sell 45, 50, 55, 60, 65, 70, so on and so forth. So there was no point in time where, you know, we indicated that, you know, MSR is not their ultimate goal in this case. But in this specific month, you know, 40 units was the next incremental goal that I thought they should be able to hit.
>
> . . . .
>
> [W]hat I'm saying here is that 40 units per month is an incremental goal. The long-term goal here, the goal that we ultimately want to hit is their MSR, which at this point in time to get to 100 percent would have been 71 units per month. That's going from the range that they were at, and at this point in time the 71 units per month isn't something that's going to just simply happen overnight. So, again, it's a compounding effect. They sell through 40 efficiently, and they move on and sell to 50, 60, 70. That requires efficiency, though, and dedication.
>
> . . . .
>
> Well, the point of me saying this wasn't—so it's not to simply be throwing MSR out the window because, of course, that's the goal here. However, in this case, we had an incremental goal of hitting 40 units per month. The intention, once they hit 40 units per month is that, you know, they were to do it efficiently, again, lowering their days' supply, organically fueling their future allocations because if they're selling efficiently, they're going to earn more vehicles. And that's going to ultimately be the stepping stone to get them to 100 percent MSR.

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> We were supplying them vehicles at this point in time to hit 40. Again, in order to actually take advantage of those additional units, though, what they need to be doing is selling through them in an efficient manner, having an at least at zone level turn rate, which they weren't at this point in time, and that's going to fuel the allocations to ultimately get them to 100 percent MSR.[252]

The ALJs disagree with Bert Ogden that a statement about MSR being a long-term goal was suggesting that MSR was unimportant or did not need to be reached.

But ultimately, the breach SOA relies on is the breach of the Sales Performance Addendum, not the breach of any MSR requirement in the Dealer Agreement. And the ALJs find that Bert Ogden did not comply with that Addendum.[253] Although by the third year of the Sales Performance Addendum, Bert Ogden did not have sufficient vehicles to reach those sales requirements, that shortage was due to its failure to efficiently sell vehicles in the first years of the addendum's term, which would have enabled it to earn a greater allocation.

2. Customer Service Obligations

SOA also argues that Bert Ogden breached the Dealer Agreement by not maintaining acceptable customer service standards. In particular, it points to the following provisions in the Dealer Agreement related to customer service for sales:

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[252] Tr. Vol. 4 at 889-92.

[253] Although SOA repeatedly points to statements in the Sales Performance Addendum acknowledging that failure to comply with its terms would be a material breach, the ALJs are not relying on those statements for purposes of this PFD.

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> 4.1 Subaru Image and Customer Satisfaction. Distributor and Dealer acknowledge the importance of satisfying their customers and the necessity of promoting the image and reputation of Subaru Products in the marketplace. Distributor and Dealer further acknowledge that in the marketing, sales and servicing of Subaru Products, it shall be the goal of Distributor and Dealer to achieve the highest level of customer satisfaction possible.
>
> 4.2 Customer Satisfaction Responsibilities of Dealer. Dealer acknowledges that Dealer is the primary contact with the customer, and, therefore, Dealer shall have the principal responsibility of advancing the goals of customer satisfaction. Accordingly, Dealer agrees to keep Distributor informed about customer complaints and concerns. Furthermore, Dealer agrees to use its best efforts to resolve customer satisfaction issues in a fair and honest manner, keeping as the primary objective the courteous and expeditious treatment of the customer.[254]

In addition, SOA cites the following provision relating to service:

> Dealer acknowledges the importance of proper and professional servicing of Subaru Products and the fair dealing with the consuming public in servicing of Subaru Products. Therefore, Dealer shall provide the best possible customer service to all Vehicle owners who may request such service. Dealer agrees that all service appointments shall be scheduled, and prompt and efficient service shall be provided, for all Vehicles, whether or not under warranty and without regard to where the Vehicle was originally purchased . . . . Dealer shall fully cooperate with Subaru Customer/Dealer Services and shall investigate and handle all complaints received from Vehicle owners with a view to securing and maintaining a high level of customer satisfaction and the goodwill of Vehicle owners toward [Subaru Corporation], SOA, Distributor, Dealer and all other Subaru dealers.[255]

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[254] SOA Ex. 11 at 11.

[255] SOA Ex. 11 at 19.

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SOA argues that Bert Ogden's OLP scores show it is not complying with the Dealer Agreement. As previously discussed, Bert Ogden's OLP scores have consistently been well below average for the DFW Zone and have sometimes been the lowest of all Subaru retailers in the zone. For example, for customer satisfaction with the purchase experience, Bert Ogden ranked 42nd of 42 retailers in the DFW Zone in 2017; 44th of 46 retailers in the zone in 2018; 43rd of 45 retailers in the zone in 2019; and 44th of 44 retailers in the zone in 2020.[256] In March 2021, Bert Ogden ranked third to last of all SOA retailers nationwide,[257] and in September 2021, it was second to last in the DFW Zone.[258] Although not as consistently low as its sales scores, Bert Ogden's service scores were often significantly below the zone's average scores.

The concern with low customer satisfaction scores is long-standing. Thus, in 2015, Bert Ogden and SOA entered into an OLP Performance Addendum to the Dealer Agreement.[259] Under the OLP performance addendum, Bert Ogden agreed that by December 31, 2016, it would improve its purchase and service experience satisfaction scores to meet the region's average scores.

Bert Ogden argues that the Dealership Agreement, including the provisions quoted above, does not impose any obligation on it to achieve a particular OLP

[256] SOA Ex. 186 at 55.

[257] SOA Ex. 129.

[258] SOA Ex. 137.

[259] SOA Ex. 7.

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score or ranking. It also noted that, unlike the Sales Performance Addendum, the 2015 OLP addendum was not included in the 2017 Dealer Agreement.

Under the Dealer Agreement, both Bert Ogden and SOA shall have the goal "to achieve the highest level of customer satisfaction possible." Relatedly, Bert Ogden has "the principal responsibility of advancing the goals of customer satisfaction." Bert Ogden is also obligated to keep SOA informed of customer complaints and concerns and to use its best efforts to resolve customer satisfaction issues in a fair and honest manner.

The ALJs agree with Bert Ogden that the 2017 Dealer Agreement does not impose a comparative OLP score requirement on it. Although there is ample evidence that Bert Ogden's customer service scores were poor compared to other dealers in the DFW Zone, and the ALJs found that those scores should be relevant to considerations of injury or benefit to the public, those scores (or the ranking) alone do not establish a violation of the Dealer Agreement.

3. Number of Certified and Exclusive Employees

The 2017 Dealer Agreement required Bert Ogden to "employ qualified and trained sales, service, and parts personnel at least in such capacities and in such numbers as are specified in the applicable MSOGs."[260] It also required Bert Ogden to ensure its personnel were trained using SOA training courses. SOA argues that Bert Ogden breached these requirements in three ways: by failing to employ the

[260] SOA Ex. 11 at 13.

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minimum number of Subaru employees; by failing to employ dedicated employees to work exclusively for Bert Ogden; and by failing to ensure its employees met the minimum training requirements.

The guidelines incorporated in the Dealer Agreement changed a bit from year to year, but generally required Bert Ogden to retain: an exclusive, certified Subaru sales manager; four certified exclusive Subaru new and used sales consultants; a certified Subaru finance and insurance manager; one certified Subaru parts staff employee; an exclusive certified Subaru service manager; and an exclusive certified Subaru service advisor.[261] These annual requirements were set out in the MSOGs that were discussed previously.

Bert Ogden argues that evidence of certification deficiencies was based on employees who left or were terminated and new employees who experienced delays in obtaining certification, which were exacerbated by the COVID-19 pandemic. It argues that Mr. Mauldin's testimony refuted the complaint that service employees who were required to be exclusive were, in fact, shared.

Among the requirements was that Bert Ogden have an exclusive sales manager.[262] In its reply, Bert Ogden suggests that it currently complies with that requirement.[263] For example, Mr. Mauldin referred to someone as "my primary

[261] SOA Exs. 15, 16.

[262] SOA Ex. 17 at 3.

[263] Bert Ogden Reply Brief at 95-96.

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sales manager and exclusive sales manager."[264] But another Bert Ogden witnesses disagreed. Ms. del Barrio testified that the current general sales manager oversees Subaru, Mazda, and Volvo.[265] This is consistent with the previously-discussed June 2019 Contact Report, in which Mr. Yannella described a visit to the Bert Ogden dealership:

> Upon arriving at the retailer, found that there [were] no employees in the showroom. When I ultimately found GSM and GM, they told me that two consultants were off dealing with personal issues, which only leaves them with one. Challenged them on this and reminded them they told me they have five, to which the GM responded they have two "in the pipeline." Ultimately had a one on one conversation with General Manager explained that their staffing levels are incredibly concerning, and that their model of being able to have consultants sell other brands is not conducive to our volume goals at the store. GM tells me that cross-selling very rarely occurs. Their GSM ultimately told me that this is not true and that it happens much more than he's comfortable with. GSM also tells me that their GM has been slow to hire people.
>
> GM ultimately tells me that they are trying to hire people, but having the ability to cross-sell is something that Bert Ogden has at all of their stores. Told him that our staff is spread very thinly as well, and we ultimately want a dedicated Sales Manager. GSM is in tune with the brand, but is now covering Mazda, Volvo, and Kia.[266]

Bert Ogden questions the veracity of all the reports showing deficiencies in staffing, and again refers to Mr. Mauldin's testimony. But the ALJs find that there was evidence of non-exclusive sales managers, along with, at times, insufficient

[264] Tr. Vol. 7 at 1685.

[265] Tr. Vol. 8 at 1973.

[266] SOA Ex. 70 at 2.

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numbers of sales consultants. For example, the April 2019 form shows that SOA required 4 sales consultants, but Bert Ogden only had one.[267] While Bert Ogden questions the accuracy of that form, they did not challenge it when it was provided to them in April 2019. A shortage is also consistent with the June 2019 Contact Report described above. As discussed previously, there is evidence of non-exclusive service managers and service advisors as of March 2021, as well.[268] The ALJs find that SOA established that Bert Ogden failed to comply with the staffing requirements of the Dealer Agreement.

SOA also presented evidence of some Bert Ogden employees lacking training, particularly those involved with finance, insurance, and internet leads. This evidence suggested, consistent with Bert Ogden's position, that the lack of training was largely temporary, and based on the high turnover at Bert Ogden. The ALJs do not find that Bert Ogden regularly failed to comply with the training requirements.

Based on the failure to comply with the 2017 Sales Performance Addendum and the failure to comply with staffing requirements, the ALJs find that Bert Ogden did not fully comply with the franchise agreement. This factor weighs in favor of termination.

[267] SOA Ex. 17 at 3.

[268] SOA Ex. 19.

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G. Enforceability of the Franchise from a Public Policy Standpoint

The final statutory factor requires the parties to address "the enforceability of the franchise from a public policy standpoint, including issues of the reasonableness of the franchise's terms, oppression, adhesion, and the parties' relative bargaining power."[269] Bert Ogden argues that the 2017 Dealer Agreement was a contract of adhesion in which it had no bargaining power and that it was subject to SOA's allocation system and SOA's decision whether to allocate MAUI units.[270]

SOA argues that the fact that the Dealer Agreement contains standard terms does not make it an unconscionable contract of adhesion. It further notes that Mr. Vackar is a sophisticated businessman who owns many dealerships and has significant experience in working and negotiating with motor vehicle manufacturers. SOA notes that Mr. Vackar repeatedly entered into the same dealer agreements with SOA for over a decade. It also notes that he entered into two Sales Performance Addendums.

The ALJs agree with SOA that the Dealer Agreement is not unconscionable (and thus unenforceable) simply because it is a standard contract[271] and further agree that Mr. Vackar is a sophisticated party with a great deal of experience with dealer agreements.

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[269] Tex. Occ. Code § 2301.455(a)(7).

[270] Bert Ogden Closing Argument at 65.

[271] *See, e.g., In re Palm Harbor Homes, Inc.*, 195 S.W.3d 672, 678 (Tex. 2006).

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Moreover, the ALJs note that testimony suggests that Bert Ogden was given benefits not given to other dealers. Mr. Griffin testified that other than for Bert Ogden, he had never signed an agreement that allowed a dealer to perform at 50% of MSR nor had he ever signed a sales performance addendum that provided a dealer three years in which to improve.[272]

As for Bert Ogden's argument that the Dealer Agreement was unenforceable because it was dependent on SOA's allocation system and its discretion to award MAUI units, although that specific system was not in place when Bert Ogden first entered into a dealership agreement with SOA, Bert Ogden was certainly aware of it when entering the 2017 Dealership Agreement. The arguments about insufficient MAUI units have previously been addressed. The ALJs do not find a contract that is subject to the distributor's set method of inventory allocation to be unenforceable simply because it is not the method of allocation that a dealer prefers.

The ALJs find that the Dealership Agreement is enforceable and not an unconscionable contract of adhesion.

[272] Tr. Vol. 3 at 686-87.

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H. Termination May Not Be Based Solely on Market Penetration

The Code provides that a distributor's desire for market penetration "does not by itself constitute good cause."[273] Bert Ogden argues that SOA's arguments have all been pretextual and that the entire termination proceeding is based solely on SOA's desire for market penetration. SOA argues otherwise.

The ALJs note that this provision does not mean sales cannot be part of the consideration: sales and compliance with the franchise are both factors the Code requires to be examined. And while there is no real doubt that SOA would like to see sales increase, there is also ample evidence that the proposed termination reasons are not a pretextual cover for increasing market penetration. SOA offered evidence of its attempts to work with Bert Ogden. For example, it entered into two separate Sales Performance Addendums without success. The ALJs would distinguish a desire for market penetration from an interest in having a dealer who was focused on Subaru products, as opposed to sharing management with other brands, having salespeople who could sell other brands as well as Subarus, and not having Subaru leads being responded to with solicitations for Mazdas or Volvos. The ALJs find that SOA is not seeking termination solely for market penetration.

[273] Tex. Occ. Code § 2301.455(b).

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VI. CONCLUSION

As described above, SOA has met its burden to demonstrate good cause for the termination of Bert Ogden's Subaru dealership in Edinburg, Texas. Bert Ogden's sales have consistently been low, and the dealership has never come close to meeting its MSR. The dealership's focus has not been on Subaru vehicles: it does not have exclusive sales management, its sales consultants may sell other makes, and requests for information about Subaru vehicles have been responded to with information about Mazda or Volvo vehicles. Bert Ogden failed to meet any of the lowered sales requirements outlined in an initial, one-year Sales Performance Addendum as well as a subsequent three-year Sales Performance Addendum. Additionally, the dealer's customer service scores relating to both purchasing and service have been consistently lower than others in the DFW Zone. While its service facilities are adequate, its parts and service staffing have been below average. Bert Ogden's honoring of warranties and its investments—the two factors that either argue against termination or are neutral—do not outweigh the other factors indicating good cause. Accordingly, the ALJs recommend that the Department deny Bert Ogden's protest of the termination.

VII. FINDINGS OF FACT

1. On August 20, 2020, Subaru of America, Inc. (SOA) sent a letter notifying McAllen Jeep, Inc. d/b/a Bert Ogden Subaru (Bert Ogden) of its intent to terminate Bert Ogden's dealership agreement.

2. On January 8, 2021, Bert Ogden filed its Notice of Protest with the Texas Department of Motor Vehicles (Department or Board).

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3. On January 8, 2021, the Department referred the protest to the State Office of Administrative Hearings (SOAH) for a contested hearing and issued a Notice of Hearing to the parties on January 14, 2021.

4. On March 17, 2021, Administrative Law Judge (ALJ) Rebecca Smith issued Order No. 2, setting the hearing date.

5. The Notice of Hearing and Order No. 1 contained a statement of the time, place, and nature of the hearing; a statement of the legal authority and jurisdiction under which the hearing was to be held; a reference to the particular sections of the statutes and rules involved; and a short, plain statement of the factual matters asserted, or an attachment that incorporated by reference the factual matters asserted in the complaint or petition.

6. The hearing on the merits was held January 18-21, 24-28, and 31, 2022, before ALJs Rebecca Smith and Susan Rodriguez. At the hearing, Bert Ogden was represented by its counsel, Dan Worthington, James Cousar, and Brent Bishop. SOA was represented by its counsel, Mark T. Clouatre, Steven B. McFarland, and Adrienne L. Toon.

7. The record closed on May 20, 2022, after the parties' post-hearing briefs and response briefs were filed.

8. SOA is the United States distributor of Subaru vehicles. SOA is divided into three regions, which are, in turn, each broken into four zones. The Dallas-based zone—the DFW Zone—includes 44 retailers in Texas, Louisiana, Arkansas, Oklahoma, and New Mexico, as well as Jackson, Mississippi and Memphis, Tennessee. Each zone is broken into geographically-defined districts containing between 10 to 12 retailers.

9. Sales of Subaru vehicles have been increasing. In 2009, approximately 7,500 Subaru vehicles were sold in the DFW Zone; by 2019, sales of Subarus in the zone totaled 45,000.

10. Bert Ogden is owned by Janet Ogden Vackar and Robert C. Vackar, who is its president and dealer principal.

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11. Bert Ogden is part of the Bert Ogden Group, which owns 23 other franchises and operates 19 different dealerships throughout the Rio Grande Valley area of Texas. Mr. Vackar is the group's chairman of the board.

12. Bert Ogden is located within the DFW Zone's District 3, which contains dealerships in Houston, San Antonio, Selma, Nederland, Bryan, and Corpus Christi, Texas.

13. The Bert Ogden dealership, in Edinburg, Texas, shares a location with the Bert Ogden Group's Volvo and Mazda dealerships. The Mazda dealership is housed in its own building. The Volvo dealership and Bert Ogden share a building, but a customer cannot walk between those two dealerships without physically leaving the building and re-entering.

14. Bert Ogden Group's Subaru, Volvo, Kia, and two Mazda dealerships all share the same general manager.

15. The same general sales manager oversees sales at Bert Ogden Group's Subaru, Mazda, and Volvo dealerships.

16. All Bert Ogden Group salespeople may cross-sell other makes of vehicles. Thus, from the same location, Bert Ogden salespeople could sell a customer a Mazda or a Volvo.

17. Bert Ogden and SOA first entered into a dealer agreement on September 23, 2009.

18. Bert Ogden's area of responsibility (AOR) is called the Pharr AOR. The Pharr AOR covers the western portion of the Rio Grande Valley, including Edinburg, McAllen, and Harlingen, but stops just on the far side of Harlingen, thus excluding San Benito, Brownsville, and most of Cameron County.

19. The Pharr AOR has a growing population, and growth in the AOR is expected to continue.

20. On May 20, 2014, SOA and Bert Ogden entered into a Sales Performance Addendum, which required Bert Ogden to increase its sales by the end of 2015.

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21. Bert Ogden entered into a new dealer agreement with SOA on July 1, 2017. At the same time, SOA and Bert Ogden entered into a second Sales Performance Addendum.

22. The 2017 Sales Performance Addendum had a three-year term. A three-year term for a sales performance addendum was unusual, but SOA accommodated Bert Ogden's request for additional time to improve.

23. Bert Ogden failed to meet the requirements of either Sales Performance Addenda.

24. The August 20, 2020 Notice of Intention to Terminate listed three specific grounds for the termination: failure to comply with sales performance obligations; operational deficiencies in the dealership; and Bert Ogden's failure to achieve acceptable levels on SOA's customer satisfaction measurement tool.

Statutory Good-Cause Factor: Bert Ogden's Sales in Relation to the Market

25. Bert Ogden has consistently been the lowest-performing dealer in the DFW Zone in terms of meeting sales goals.

26. The metric SOA uses for evaluating a dealer's sales performance is called minimum sales responsibility (MSR). This nationwide system was in place when Bert Ogden signed its dealership agreement.

27. The MSR is calculated by geographic area and is based on segments—groups of similar, competitive vehicles in terms of size, configuration, and price.

28. The first step in determining the MSR is to calculate, by segment, the percentage of new registered vehicles in the relevant area that are Subaru vehicles. That percentage would be the MSR for Subaru vehicles in that segment.

29. Through 2017, the DFW Zone was the benchmark for the MSR. In other words, the MSR was based on the percentage of new Subaru registrations in the entire zone.

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30. In 2018, SOA changed its benchmark and began using registration in the district—in Bert Ogden's case, District 3.

31. SOA considers a retailer who achieves 100% MSR to be an average retailer.

32. Bert Ogden consistently failed to achieve its MSR.

33. When the parties entered into the 2017 Sales Performance Addendum, Bert Ogden's MSR was 860 vehicles, but it had only sold 359 vehicles. The 2017 sales performance addendum required Bert Ogden to reach 50% of MSR for the one-year period ending June 30, 2018; to reach 60% of MSR for the one-year period ending June 20, 2019; and then to reach 70% of MSR for the one-year period ending June 30, 2020.

34. Bert Ogden did not reach 50% of MSR in the initial one-year period of the 2017 sales performance addendum.

35. As of December 2018, Bert Ogden was selling at 44.10% of MSR, which ranked in the bottom 10% of the DFW Zone retailers.

36. Bert Ogden had the lowest overall MSR rank in the DFW Zone for the period 2016-2020, achieving an average of 41.3% of its MSR.

37. The second-to-lowest dealership's MSR average for that period was 60.3%.

38. MSR is a relevant, useful tool for analyzing Bert Ogden's sales in comparison to the market.

39. The MSR benchmark, based on district registrations, does not perfectly match AOR registrations, but sufficiently takes into account local preferences for types of vehicles.

40. The Pharr AOR's demographic and geographic specifics do not make the MSR an invalid tool for measuring its sales in comparison to the market.

41. SOA allocates vehicles to dealers largely based on the retailer's days' supply of each carline.

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42. Days' supply is the auto industry's method for measuring levels of inventory and is calculated by comparing how much of something is sold per day to how much of that item is in inventory.

43. In allocating inventory, SOA tries to consider the average inventory level, based on days' supply, across an area and tries to keep retailers as close as possible to the average based on their relative sizes.

44. Dealers can increase their allocations by increasing sales, thus reducing their days' supply. The allocation system would attempt to raise the dealer's inventory back up to the average. On the other hand, slow sales reduce allocations because a dealer already has a higher days' supply.

45. SOA intentionally operates with a lean inventory amount. It has a very low days' supply of vehicles to allocate.

46. SOA also has a separate discretionary allocation for another set of vehicles, which are called Market Action Unit of Inventory (MAUI) vehicles. MAUI units are supplemental to a dealer's earned allocation.

47. Bert Ogden received a meaningful number of MAUI vehicles.

48. The Bert Ogden Group, throughout all its other dealerships, operates on a high-inventory model.

49. Bert Ogden regularly had a greater days-supply than other Subaru dealers.

50. Bert Ogden's sales increased significantly shortly after the termination notice without a significant change in the vehicles it had available.

51. Bert Ogden's lower sales than the rest of the district or zone were not the result of SOA's inventory allocation.

52. Bert Ogden's sales in relation to the market supports termination.

Statutory Good-Cause Factor: Dealership's Investments and Obligations

53. Bert Ogden invested $129,574.50 for upgraded lighting, a purchasing system upgrade, and a parking lot expansion.

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54. Other Bert Ogden Group entities paid for most of the original renovation of the dealership, Bert Ogden's current service bays, and electronic signs that advertise all the Bert Ogden Group dealerships. These items cost a significant amount of money.

55. Bert Ogden does not own the property on which the dealership is located. It subleases the property from the Bert Ogden Group's Mazda dealership. This lease's term extends through 2038.

56. Because Bert Ogden itself did not invest much in the dealership, its investments would not be greatly harmed by the termination.

57. This factor does not weigh in favor of or against termination.

Statutory Good-Cause Factor: Injury or Benefit to the Public

58. SOA uses its Owner Loyalty Program (OLP) as a way of measuring customer satisfaction.

59. The OLP consists of different surveys sent to customers who have purchased or leased a Subaru vehicle or who have had vehicle service performed at a Subaru dealership. Customers score their satisfaction with their experience at the dealership on a five-point scale.

60. Survey response scores are tabulated, and SOA comparatively ranks dealers in the same zone to identify dealers that need help improving the customer experience in their stores.

61. When ranked against other dealers in the DFW Zone, Bert Ogden placed at or near the bottom in purchase satisfaction scores from 2017-2021. Bert Ogden also ranked below the Zone in service satisfaction for most of 2019, all of 2020, and most of 2021.

62. If the dealership agreement is terminated, there will be a transition period before a new dealer is in place during which there will be no Subaru dealership in the Rio Grande Valley.

63. There is a possibility of inconvenience to the public if there is no local dealer to perform service work, including warranty and recall work.

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64. SOA has indicated that it intends to quickly install a new dealer, so any inconvenience will be brief and is outweighed by the benefit the public will realize once a new dealer is established.

65. There is little benefit to the public to continuing Bert Ogden's dealership agreement, considering the dealership's consistently low purchase and service satisfaction rankings.

66. The possibility of inconvenience to customers during the transition to a new dealer, and the lack of benefit of leaving Bert Ogden's dealership agreement in place, is outweighed by the benefit to the public of a new Subaru dealer.

67. This factor weighs in favor of termination.

Statutory Good-Cause Factor: Adequacy of Service Facilities, Equipment, Parts, and Personnel

68. There was no evidence that Bert Ogden's service facilities are inadequate in relation to those of other dealers.

69. A vehicle in operation, or VIO, is a vehicle that is seven model years old or newer that is still in operation and being driven.

70. Parts and accessories per VIO is a measure of service opportunity because higher parts and accessories inventory per VIO makes it more likely that a dealership will have parts on hand to complete service work in a timely fashion.

71. For nearly all of 2017-2021, Bert Ogden reported having less service parts and accessories inventory per VIO than other similar-sized Subaru dealers in the DFW Zone.

72. From 2017-2021, Bert Ogden reported having substantially less service equipment (at cost) than other similar-sized Subaru dealers in the DFW Zone.

73. From 2017-2021, Bert Ogden reported having substantially less service equipment (at cost) and service equipment (at cost) per VIO than other similar-sized Subaru dealers in the DFW Zone.

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74. Bert Ogden had higher turnover in its parts and service departments than other dealers in District 3.

75. Bert Ogden employed fewer Subaru-exclusive employees in its parts and service departments than other dealers in District 3. From 2019-2021, Bert Ogden employed at least four service managers, all of whom held positions of responsibility with other Bert Ogden Group dealerships at the same time.

76. Bert Ogden has never had a Subaru-exclusive parts manager.

77. As VIOs increased, other dealers in District 3 increased the number of service department employees and dedicated personnel in key positions like service manager and parts manager. Bert Ogden has not made similar changes to its service operations.

78. Bert Ogden did not employ a Subaru-exclusive service manager from 2017-2021. During those years, the service manager position was shared with other Bert Ogden Group dealerships.

79. Bert Ogden did not employ a Subaru-exclusive service advisor from 2017-2021. During those years, the service advisor position was shared with other Bert Ogden Group dealerships.

80. Bert Ogden had inadequate service parts, equipment, and personnel in relation to other dealers of new motor vehicles of the same line-make, which weighs in favor of termination.

Statutory Good-Cause Factor: Bert Ogden's Warranty Service

81. The evidence did not establish that Bert Ogden refuses to perform warranty work, including on older, high-mileage Subaru vehicles covered under warranty extensions or extended service agreements.

82. This factor weighs against termination.

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Statutory Good-Cause Factor: Compliance with the Franchise

83. The 2017 Sales Performance Addendum set out modified sales requirements of 337 sales in June 2018, 516 in June 2019, and 602 in June 2020.

84. Bert Ogden's actual sales at the end of each one-year period were 327 in June 2018, 338 in June 2019, and 358 in June 2020.

85. Although Bert Ogden had modest increases in each year, the dealership did not meet any of the 2018-2020 sales requirements in the 2017 Sales Performance Addendum.

86. Failure to meet the requirements of the Sales Performance Addendum was not due to SOA's inventory allocation system.

87. Although by the third year of the Sales Performance Addendum, Bert Ogden did not have sufficient vehicles to reach those sales requirements, that inventory shortage was due to its failure to efficiently sell vehicles to enable it to earn a greater allocation.

88. For extended periods, Bert Ogden failed to comply with SOA's staffing requirements—including those requiring an exclusive sales manager, a certain number of sales consultants, an exclusive service manager, and exclusive service advisors.

89. Bert Ogden did not fully comply with the franchise agreement.

90. This factor weighs in favor of termination.

Statutory Good-Cause Factor: Enforceability of the Dealer Agreement

91. That the Dealer Agreement contains standard terms does not make it an unconscionable contract of adhesion.

92. Mr. Vackar is a sophisticated businessman with a great deal of experience with dealer agreements.

93. SOA is not seeking termination solely to increase market penetration.

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VIII. CONCLUSIONS OF LAW

1. The Department and its governing Board have jurisdiction and authority over the subject matter of this case. Tex. Occ. Code ch. 2301.

2. SOAH has jurisdiction over all matters relating to the conduct of a hearing in this matter, including the preparation of a proposal for decision with findings of fact and conclusions of law. Tex. Occ. Code § 2301.704; Tex. Gov't Code ch. 2003.

3. Notice of the termination was properly provided. Tex. Occ. Code § 2301.453; 43 Tex. Admin. Code § 215.111.

4. Bert Ogden timely filed its notice of protest. 43 Tex. Admin. Code § 215.111.

5. Notice of Hearing was properly provided. Tex. Occ. Code §§ 2301.705, .707; Tex. Gov't Code §§ 2001.051-.052; 43 Tex. Admin. Code § 215.34.

6. The Dealer Agreement is a "franchise" as defined by Texas Occupations Code § 2301.002(15).

7. A manufacturer may not terminate or discontinue a franchise with a franchised dealer unless the manufacturer provides notice of the termination and: (1) the franchised dealer consents in writing to the termination, (2) the appropriate time for the dealer to file a protest has expired, or (3) the Board makes a determination of good cause for the termination. Tex. Occ. Code § 2301.453(a), (g).

8. SOA has the burden of showing by a preponderance of the evidence that good cause exists for the termination of Bert Ogden's dealership. Tex. Occ. Code § 2301.453(g); 1 Tex. Admin. Code § 155.427.

9. In determining whether SOA established by a preponderance of the evidence that there is good cause for terminating Bert Ogden's franchise, the Board is required to consider all existing circumstances, including seven statutory factors. Tex. Occ. Code § 2301.455(a).

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10. SOA met its burden of demonstrating good cause for the termination of Bert Ogden's franchise. Tex. Occ. Code § 2301.453(g).

11. Bert Ogden's protest should be denied, and the termination of Bert Ogden's Subaru franchise should be approved.

SIGNED JULY 19, 2022.

ALJ Signature(s):

Susan Rodriguez,

Presiding Administrative Law Judge

Rebecca Smith,

Presiding Administrative Law Judge

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Bert Ogden Subaru's

Exceptions to the ALJ PFD, Including Attachments A and B

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Carol Hale, CLERK

MCALLEN JEEP, INC.	§	
d/b/a BERT OGDEN SUBARU,	§	
Petitioner	§	**BEFORE THE STATE OFFICE**
	§	
vs.	§	**OF**
	§	
SUBARU OF AMERICA, INC.,	§	
Respondent	§	**ADMINISTRATIVE HEARINGS**

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MVD DOCKET NO. 21-0004-LIC

MCALLEN JEEP, INC.	§	
d/b/a BERT OGDEN SUBARU,	§	
Petitioner	§	**BEFORE THE STATE OFFICE**
	§	
vs.	§	**OF**
	§	
SUBARU OF AMERICA, INC.,	§	
Respondent	§	**ADMINISTRATIVE HEARINGS**

MCALLEN JEEP, INC. D/B/A BERT OGDEN SUBARU'S EXCEPTIONS TO THE PROPOSAL FOR DECISION

Complainant McAllen Jeep, Inc. d/b/a Bert Ogden Subaru ("Bert Ogden Subaru") asserts the following exceptions to the Proposal for Decision ("PFD") issued on July 19, 2022, which recommends the termination of Bert Ogden Subaru's franchise by Subaru of America, Inc. ("SOA").

I. INTRODUCTION AND SUMMARY OF THE EXCEPTIONS

A. Bert Ogden Subaru Is Not the Type of Failing Dealership for Which Legal Precedent Supports the Imposition of the Harsh and Punitive Penalty of Termination

The PFD wrongly recommends terminating Bert Ogden Subaru's franchised Subaru dealership in Edinburg, Texas. This PFD marks a substantial departure from the existing standards which have been required to support the termination of a franchised dealer in Texas. Bert Ogden Subaru is not the type of failing dealership for which the harsh and punitive penalty of termination is appropriate. To the contrary, Bert Ogden Subaru is a thriving dealership which has demonstrated the ability to sustain continued growth in a market with an unparalleled history of failure by SOA and its eight prior Subaru franchisees. There is no precedent for termination of a dealership under

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the totality of the circumstances presented in this case and it should not be the policy of the Texas Department of Motor Vehicles ("TDMV") to terminate a dealership where the dealer's investment and the dealership's achievement of consistent and substantial sales growth is without question.[1]

TDMV case law has upheld termination of dealers who have been dishonest, who have falsified reports of recall work, who have consistently failed to improve sales, who have failed to maintain a functional dealership facility, who have failed to invest in their operation, and who have failed to perform warranty or recall service. None of these circumstances are present in this proceeding and Bert Ogden Subaru did not engage and was not found to have engaged in any of the types of operations or actions that have been found to be "good cause" for termination in the cited cases or in other TDMV termination proceedings.

The PFD is dismissive of this lack of precedent and rejects Bert Ogden Subaru's argument that there is no precedent for terminating a dealer with a record of improved sales comparable to Bert Ogden Subaru, providing as follows:[2]

> **"As for its argument that SOA may not terminate the contract of a dealer whose sales are increasing, the ALJs find that argument unsupported by the case law Bert Ogden cites.[3] Certainly sales after termination notice are relevant, but the Code requires an examination of sales compared to the market, not sales compared to previous years."[4]**

---

[1] The following TDMV cases were cited by the parties to this proceeding as relevant authority. None of them involves termination of a dealer with a record of sales growth remotely comparable to Bert Ogden Subaru. *Nissan North America, Inc. v. Texas Department of Motor Vehicles*, 592 S.W.3d 480 (Tex. App. Texarkana 2019); *Landmark Chevrolet Corp. v. General Motors Corp.,* Docket No. 02-0002 LIC (lex. Motor Vehicle Bd. Sep. 16, 2004); *Austin Chevrolet, Inc. v. Motor Vehicle Bd. and Motor Vehicle Div. of Texas Dept. of Transp.,* 212 S.W.3d 425 (Tex. Ct. App. 2006); *All Star Imports, Inc. v. Mazda Motor of North America, Inc.,* MVD Docket No. 19-0015.LIC; *Bates Nissan, Inc. v. Nissan North America, Inc.,* 2016 Westlaw 1534032 (Tex. SOAH Apr. 8, 2016); *Cecil Atkission Orange, LLC v. FCA US LLC,* MVD Docket No. 15-0015.LIC; *Mr. Yamaha, Inc. v. American Suzuki Motor Corporation,* MVD Docket No. 09-0043.LIC; *Star Houston, Inc. d/b/a Star Motor Cars v. Volvo Cars of North America, LLC,* MVD Docket No. 16-0018.LIC; *Sweeten Truck Center, L.C. v. Volvo Trucks North America,* 2016 WL 4979826 (Tex. App. Austin, 2016); *HFJ Group, LLC d/b/a Lone Star Emergency Group, LLC. v Ferrara Fire Apparatus, Inc.,* 2021 TX SOAH LEXIS 136, (Tex. SOAH July 23, 2021), SOAH Docket No. 608-19-5608.LIC, and MVD Docket No. 19.0018.LIC.

[2] *See PFD P. 39-40 and fn. 146.*

[3] *Id at fn. 146.*

[4] *See PFD P. 39-40 and fn. 146.*

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This assertion is incorrect in several respects. In the first place, nothing in the language of the Occupations Code suggests that the relevant criteria - "sales relative to sales in the market," - limits the meaning of "market" to a narrow time frame rather than a geographic area over an extended period of time. In this proceeding, the evidence established that, as it related to sales, Bert Ogden Subaru each year sold all the units it was provided by SOA and its sales record was an ever-increasing pattern of growth for years prior to and subsequent to the Notice of Intent to Terminate ("NOIT"). This dealer's record of increasing sales was not limited to the period after the Notice of Intent to Terminate.

The PFD references the following two-dealer termination PFDs as alleged support:

a) *All Star Imports v. Mazda of N. America, Inc.*; and

b) *Bates Nissan, Inc. v. Nissan North America, Inc.*[5]

These opinions do not stand for the proposition for which they were offered and/or relied upon. *All Star Imports* involved a San Antonio Mazda dealer that was ***falsifying records*** on safety recalls, putting car owners' safety and lives in danger. The statutory termination factor of "sales relative to sales in the market" ***was not even an issue in the All Star Imports case***, as opposed to the Bert Ogden Subaru termination proceeding, in which the essential grounds for termination was Bert Ogden Subaru's "sales relative to sales in the market" and its MSR scores on SOA's "minimum sales responsibility" metric. On page 32 of the *All Star Imports* PFD, the ALJ noted "*Mazda is not relying on World Car North's sales to justify termination and did not introduce evidence about those sales*." (emphasis added). Other evidence in the record showed that the dealership had a precipitous drop in sales by unit from 2013 to 2017 (769 cars sold down to 239) and then an uptick for the next two years. But since sales was not a contested issue in that case it is perplexing that

[5] *All Star Imports, Inc. v. Mazda Motor of North America, Inc.*, TMVD Docket No. 19-0015 LIC and *Bates Nissan, Inc. v. Nissan N. Am., Inc.*, SOAH Docket No. 608-14-3211.LIC

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the PFD would cite *All Star Imports* as authority that TDMV precedent authorizes terminating a dealer whose unit sales and overall sales revenue have consistently ***improved*** for a five-year period leading up to a termination hearing.

Just as important, there was no allegation in this termination proceeding that the dealer had failed to perform essential recalls and no issue as to falsification of records. *All Star Imports* is a "dishonest dealer case" and a threat to public safety case, and not a termination based on dealer sales performance. It in no way rebuts Bert Ogden Subaru's contention that TDMV policy and precedent do not support for termination of a dealer with long term, consistently improving unit sales and dollar sales revenues.

The second cited case, *Bates Nissan, Inc. v. Nissan North America, Inc.*[6], (hereinafter, *"Bates Nissan"*) is even more supportive of the Bert Ogden Subaru's contention that there is no precedent for terminating a dealer whose sales are consistently improving. Most important, in *Bates Nissan*- **the dealer was not terminated.** According to the PFD, for the period 2009-2013, "Overall, Bates Nissan was the lowest scoring (Nissan) dealer in Texas, based on cumulative RSE percentages (Nissan's version of MSR)." Bates Nissan's performance in terms of RSE then improved from November 2013 to June 2015. But, since the PFD did not recommend termination of Bates Nissan and the TDMV denied Nissan's termination request, *Bates Nissan* supports rather than refutes Bert Ogden Subaru's contention that there is no precedent for terminating a dealer with consistently improving unit sales and overall sales revenues over an extended period leading up to the hearing.

[6] *Bates Nissan, Inc. v. Nissan N. Am., Inc.*, SOAH Docket No. 608-14-3211.LIC.

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One of the key issues in *Bates Nissan* was the PFD's conclusion of law that Nissan's RSE requirement (almost identical to SOA's MSR requirement) was not consistent with Nissan's contractual requirement that Bates Nissan effectively sell Nissan cars in its assigned sales territory, since RSE scores for all Nissan dealers were based on sales both inside and outside of the dealer's AOR (area of responsibility). Rather than supporting termination of Bert Ogden Subaru, this legal precedent is consistent with the contention that TDMV precedent does not support a termination of a dealer with a record of increasing unit sales and sales revenues comparable to Bert Ogden Subaru.

To summarize, TDMV case law has upheld termination of failing dealerships that have been dishonest, that have consistently failed to improve sales, that have failed to maintain a functional sales facility, that have failed to invest in their operation, and that have failed to perform recall or warranty service. TDMV case law shows that at least one dealer, Bates Nissan, retained its dealership even after an extended period in which it was the "lowest scoring dealer in Texas." TDMV case law provides ***no support*** for the premise that a dealer can be terminated based on "sales relative to sales in the market" when that dealership has maintained a modern functional facility and has consistently increased overall unit sales and sales revenues for more than half a decade prior to the termination proceedings.

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B. The PFD Allows SOA to Rewrite the Contract and Impose New Obligations on Bert Ogden – Obligations Never Bargained-For By SOA and Never Agreed to by Bert Ogden

Nothing in the SOA franchise agreement in this case (and nothing in Texas law) supports the notion that a manufacturer may terminate a dealer because the dealer scores lower than other dealers in customer satisfaction surveys – especially when the dealer is consistently rated at or close to "EXTRAORDINARY" by its customers.[7] Bert Ogden's Owner Loyalty Program ("OLP") scores have consistently achieved a level SOA characterized as "EXTRAORDINARY" for both Purchase and Service. SOA and Bert Ogden Subaru never bargained for or contractually agreed that the dealer would be required to achieve any specific OLP score as a condition for keeping its franchise.

The terms of the PFD would allow SOA to rewrite the contract with Bert Ogden and impose new obligations never bargained-for and never agreed to by Bert Ogden. Granting SOA this unilateral power to rewrite the franchise agreement is even more egregiously unfair given that the OLP "single satisfaction score" metric SOA cites as a basis for termination has now been abandoned by SOA. In short, the PFD would allow SOA to terminate Bert Ogden based on alleged non-compliance with an undefined metric never agreed to as a condition-precedent for retaining a franchise – which undefined metric was abandoned by SOA before the start of the hearing in this case.

[7] Previously discussed in Bert Ogden Post-Hearing Brief pg. 3.

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C. The PFD Allows SOA to Rewrite the NOIT Without Notice to the Dealer

1. Notice Given and an Opportunity to Respond:

Page 15 of the PFD states that the NOIT listed three (3) specific grounds:

1) the sales performance agreement;

2) the dealer's alleged failure to achieve acceptable levels of customer satisfaction per the SOA tool, and

3) "operational deficiencies in the dealership."

Bert Ogden Subaru was given notice of "specific grounds" so that it could respond at the hearing and address all of the grounds upon which termination was sought. Notice of these "specific grounds" is mandatory under the law as is set out in Texas Occupations Code §2301.453 (c) which requires that, "….the manufacturer, distributor, or representative ***must provide written notice*** by registered or certified mail to the dealer and the board ***stating the specific grounds for the termination*** or discontinuance."

In cross-examination, SOA witnesses admitted that the only three grounds for termination asserted in the NOIT by SOA were the following:

1) The Sales Performance Agreement dated July 1, 2017;

2) Bert Ogden Subaru's MSR scores, and

3) Bert Ogden Subaru's customer satisfaction (OLP) scores.

The NOIT did not invoke other unnamed "operational deficiencies." Since the SOA witnesses who drafted and signed the NOIT did not assert that it invoked "operational deficiencies" as a specific ground for termination, neither should the PFD.

Bert Ogden Subaru took the position in the hearing that the NOIT should have clearly stated any specific grounds relied on by SOA for termination, as required by the Occupations Code.

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Some cases cited by the PFD assert that a manufacturer may present grounds for termination at the hearing even if those grounds have not been raised in the NOIT and have not otherwise been presented to a dealer. This misinterprets the provisions of the Texas Occupations Code that require that an NOIT state the "specific grounds" relied on by the manufacturer. At the very least, the PFD and the TDMV should give little credence to a manufacturer's post-NOIT grounds for termination which:

1) a dealer had no notice and chance to cure, per the Franchise Agreement; and

2) which were not specifically stated in the NOIT, as required by Texas law

While a manufacturer might cite grounds not raised in an NOIT in a breach of contract lawsuit, grounds not previously raised with a dealer and not stated in the NOIT should not be "good cause" for this agency to terminate a franchise.

2. This PFD Rewards a Manufacturer's Ambush of a Dealer

The Final Hearing consisted of an airing of general grievances by SOA - not asserted in the August 20, 2020 NOIT and, in most cases, for which SOA never gave the dealer notice and an opportunity to cure as required by Section 17 of the Franchise Agreement.

Page 14 of the PFD quotes a SOA witness as testifying that "SOA takes the proposed termination of a dealer very seriously, that terminations are infrequent, and that SOA tries to give dealers an opportunity to resolve problems…." The PFD cites and relies on this self-serving testimony despite the fact that the Tribunal refused to admit Bert Ogden Subaru's proffered evidence consisting of recent NOITs for the SOA Corpus Christi and Midland dealerships. These NOITs, which SOA objected to, contained highly relevant evidence both of the types of egregious conduct that SOA has previously considered to be grounds for termination, and the extent to which SOA afforded other dealers an opportunity to cure as required by Section 17 of their franchise

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agreements.

Before serving the NOIT in this case, SOA required the dealer to enter into two side agreements related to MSR and one side agreement related to customer satisfaction scores (OLP). However, SOA never offered the dealer written notice of other alleged contractual breaches, much less written agreements tendering a chance to cure the other alleged dealer deficiencies which were not named in the NOIT but were cited as good cause for termination in the hearing.

In a glaring omission, the PFD makes no mention of the Franchise Agreement provision on notice and cure, which obligated SOA to advise the dealer of alleged contractual breaches and to afford the dealer a chance to cure them. While the PFD accepts at face value SOA's assertion that it takes termination very seriously, SOA's breach of the contractual terms requiring notice and a chance to cure belies this claim. The PFD should be amended to note SOA's failure to abide by the notice and cure provisions, to omit the language about SOA's purported approach to termination, and to note that the dealer proffered evidence of the manner in which SOA handled other recent terminations of dealers in Corpus Christi and Midland but was not permitted to put on that evidence. Those exhibits, if they had been admitted, would have chronicled conduct by the terminated dealers far more serious than anything alleged against this dealer, including loss of one dealer's financing (floor plan) and falsification of records by the other dealer. Those exhibits would have provided evidence that SOA did afford those dealers the contractually required notice and opportunity to cure, in spite of alleged dealer misconduct far more serious than the weaker grounds for termination cited in this proceeding.

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3. The PFD Allows a Manufacturer to Create New Performance Standards

a) Regional and Zone Comparative Sales Ranking

The NOIT cited as a specific ground for termination Bert Ogden Subaru's sales performance as a comparative ranking between it and other dealerships within the SOA Central Region (which includes all of Texas and all or parts of 19 other states from the Canadian border to the Gulf of Mexico). It made a similar comparison of sales performance between Bert Ogden Subaru and all the other dealers in the DFW Zone. In each instance, the performance metric cited by SOA was MSR scores.

In response to Bert Ogden Subaru's objections to the manner in which these comparisons were made - failing to take into account the demographic and geographic differences between the AORs of other dealerships in the Central Region and DFW Zone as compared to Bert Ogden Subaru 's AOR - the PFD dismissed this evidence by erroneously conflating two components of MSR. The first is the manner in which each dealer's MSR requirement is currently calculated (based on vehicle sales within District 3 of the DFW Zone) with the manner in which each dealers MSR scores is compared - which involves comparison of MSR scores of Bert Ogden Subaru to those of all the other dealers in the Central Region and DFW Zone.

To summarize, the PFD correctly finds that each dealer's MSR requirement is primarily based on sales of Subaru cars and comparable models of other line/makes within the relevant SOA district. But SOA then takes that MSR- a dealer's minimum sales requirement - and uses it as a metric to assign each dealer a score, which can be 100% of MSR, 75% of MSR, or- in extreme cases - more than 300% of the dealer's MSR. SOA then prepares comparative rankings, which were offered into evidence in this proceeding, comparing each dealer's MSR scores not just with those of other dealers in its district, but with the MSR scores of all the dealers in the DFW Zone

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and in the SOA Central Region. SOA cites the comparative MSR score, and note the MSR requirement, as its grounds for terminating this dealer[8].

b) Comparative Ownership Loyalty Program ("OLP") Ranking

The NOIT claimed that Bert Ogden Subaru's "Extraordinary" OLP ("Customer Service") ranking for both purchase and service were not "Extraordinary" enough when compared to the other relative scores of other dealers within the DFW Zone. However, SOA admitted that there was no existing policy of comparative ranking either in the franchise agreement or as a SOA policy. A policy that comparative OLP scores would be grounds to terminate a dealer apparently came into existence for the first time in the August 2020 NOIT in which SOA was obligated to state its 'specific grounds' to terminate Bert Ogden Subaru. No such policy was referenced in the parties' franchise agreement or any of the extensive SOA documentation provided to dealers to explain the OLP Program.

The PFD accepts the validity of this comparative OLP ranking in spite of its dubious origins in the NOIT and goes on to find that Bert Ogden Subaru was a "Poor" performing dealer despite the unchallenged evidence that its actual customer satisfaction scores were "Extraordinary" as defined by SOA. As set out in more detail below, Bert Ogden Subaru's OLP scores are not and cannot be "good cause" to terminate a dealer. The unilateral creation of a previously non-existent standard by a manufacturer as grounds for the termination of a dealer has not previously been permitted and should not be allowed in this proceeding.

[8] See Exhibit 172.

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4. The PFD Ignores the Manufacturer's Role in a Dealer's Sales Performance

Bert Ogden Subaru sold all of the inventory it was provided to sell. As will be discussed below, the PFD ignores that SOA not only set the dealer's sales requirements, it also controlled the supply of vehicles to Bert Ogden Subaru. SOA admitted that, even if Bert Ogden Subaru had "turned" at the Zone level, it could have not met the SOA imposed sales requirements.

The PFD claims that Bert Ogden Subaru received a "meaningful" amount of "MAUI" vehicles (discretionary inventory distributed by SOA to dealers) without acknowledging that by not designating these vehicles as "SSLP" (whereby the sales were triggered as soon as the vehicles were delivered) the ability of MAUI units to increase a dealer's "earn" was substantially limited. Bert Ogden Subaru demonstrated substantial growth from 2017-2021 and a dealer should not be terminated because it could not meet a sales requirement for which the manufacturer controls the setting of the requirement and a dealer's ability to comply.

D. Bert Ogden Subaru Has Proposed an Alternative Sales Performance Metric to MSR

The PFD erroneously states, on P. 23, that Bert Ogden Subaru has not offered an alternative sales performance metric to SOA's preferred metric of MSR. This is incorrect. During the course of the hearing, and in its Closing Statement and Rebuttal to SOA's Closing Statement, Bert Ogden Subaru consistently proposed that the most appropriate metric for its sales performance is whether its sales increased or decreased in the years leading up to the hearing.

The graphic on page 18 of this document demonstrates that annual new car sales by this dealer rose from 325 in 2017 to just under 500 in 2021, a dramatic and steady improvement. Total sales, which include service and parts as well as new vehicles, rose even more sharply, from $13.9 million in 2017 to $22.1 million in 2020 (the last calendar year for which data was available at the time of the hearing). This is a reliable and probative metric because it tracks this dealer's

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performance in its own market over a sufficient period of time to account for variations that may arise from extraneous factors, such as interruption of inventory due to chip shortages, the consequences of the COVID pandemic, and fluctuations of the Rio Grande Valley economy. This proposed sales performance metric confirms that Bert Ogden Subaru is a successful dealership with a consistent record of sales improvement. Just as important, this objective and easily verified sales performance metric does not suffer from the severe methodological flaws of MSR discussed elsewhere in these Exceptions.

E. The PFD Omits and/or Ignores Probative Evidence

The PFD omits testimony and/or exhibits which are probative evidence as to the issues in the case. The specific testimony and/or exhibits which were ignored and/or omitted by the PFD are set forth in **Attachment B**, which is organized by the following topic areas:

- sales in relation to the market;
- injury or benefit to the public;
- adequacy of service facilities;
- equipment, parts and personal in relation to other dealers;
- compliance with franchise

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II.
SUBARU'S PRIOR HISTORY OF FAILURE IN THE RGV

A. SOA Seeks to Ignore Over Three (3) Decades of Failure of its Product in the RGV

Pages 39-41 of the PFD are dismissive of Bert Ogden Subaru's argument that a 40-year history of Subaru dealership failures in the RGV (prior to this dealer's franchise, which began in 2009) is relevant to the ultimate issue of "good cause" for termination in this proceeding. The relevant factor to be considered in a termination case is a dealer's "sales relative to sales in the market." The ALJs cite no caselaw or TDMV precedent that this criteria and this term precludes the sales record of a dealer facing termination being compared to the sales of previous dealers of the same line make **in the same market area**.

Bert Ogden Subaru presented unrebutted evidence, summarized below, that SOA tried eight times between 1976 and 2009 to establish a successful Subaru dealership in the Rio Grande Valley, an area that includes the Pharr AOR, and failed each time. While markets evolve over time, many of the characteristics that define a market stay fairly constant over time. In this case, the predominant ethnicity (heavily Hispanic) of the market area did not change over these decades, nor did the fact that this area of Texas has historically been characterized by markedly lower levels of education and lower income. It goes without saying that the flat terrain and hot climate of the market area did not change over this time period, with the possible exception that the climate may have gotten even hotter and drier. Similarly, the low market demand for four wheel and all-wheel drive cars (as opposed to trucks) has not changed over time, a factor that has always limited the appeal of Subaru, which markets only one model which is not all-wheel drive. Yet the PFD ignores these significant and largely unchanged characteristics of the market area at issue in this hearing and insists that the only relevant comparison for "sales relative to sales in the market" should be a

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dealer's sales compared to the contemporaneous sales of other dealers in other markets. This defies common construction of the term "market" and turns this statutory criteria on its head, giving greater weight to this dealer's sales compared to those of other dealer's in wholly dissimilar markets as opposed to comparing this dealer's sales to those of prior dealers in the same market.

THIS IS THE PHARR AOR PRIOR TO BERT OGDEN SUBARU[9]

DEALER NAME	APPOINTMENT DATE	BASIS FOR TERMINATION
Aleman Motor Co.	8/1/76	SOA Did Not Know
Mike Hale Subaru	3/1/83	SOA Did Not Know
Cameron Subaru	1/2/87	SOA Did Not Know
Tipton Motors	3/9/88	Voluntary Resignation
Burns Motors	3/29/90	Voluntary Resignation
Harlingen Subaru	11/1/96	Buy/Sell
Valley Subaru	5/21/2002	Buy/Sell
Rodriguez Subaru of South Texas	9/8/2005	Voluntary Resignation

[9] See Exhibit 487.

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B. The Texas Occupations Code Says Nothing About:

1) Minimum Sales Responsibility ("MSR"); and/or

2) Other Minimum Sales Metrics

In studiously ignoring its multi-decade history of futility within the Rio Grande Valley, SOA would restrict the definition of "sales relative to sales in the market" as being sales by Subaru dealer A compared to sales by Subaru dealer B in a given time frame, because that definition dovetails with Subaru's preferred metric: MSR, or minimum sales responsibility. But the Texas Occupations Code says nothing about MSR or other minimum sales metrics: far from the limited and restricted approach sought by SOA, the Code uses the language of market economics, in which "sales in the market" are not necessarily limited to a narrow time frame defined by a manufacturer seeking to terminate a dealership. If SOA had addressed this dealer's "sales relative to sales in the market" in the larger context- sales relative to those of the other eight Subaru dealers who failed to establish the brand in the Rio Grande Valley, SOA would have to admit that this dealer's sales far exceeded those of every prior Subaru dealer in the same market.

To the extent that local brand preference helps drive car sales, that preference may change over time, but it also may remain consistent. Subaru was a little-known brand when the first dealer opened shop in the RGV in the 1970s, and SOA's own evidence shows that the brand remains little known today- especially among Hispanic car buyers - and most especially buyers in areas close to Mexico. In responding to the evidence of this dealer's continually increasing unit sales, the PFD simply falls back on how this dealer's MSR scores compared to those of other dealers in other parts of the DFW Zone, but not in the RGV. Since MSR is a flawed metric that does not track local brand preferences, the fact of significantly increasing unit sales should be afforded greater weight than comparative MSR scores with dealers as far away as Arkansas and New Mexico.

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The PFD also dismisses the argument that the Bert Ogden Subaru MSR requirement increases when the Bert Ogden Group dealerships in the RGV sell more cars from manufacturers who provide adequate inventory. The PFD simply assumes that successful sales records at other Group dealerships somehow shows that the Group is more focused on other brands. To the contrary, the evidence shows that the Group is selling more of the other manufacturers' cars because of the fact that that they have more of them in stock. The Group's success in selling other line/makes paradoxically does raise the MSR requirement for the one line make (Subaru) that a Bert Ogden dealership typically does not have a sufficient inventory of. This contradiction is yet another reason that MSR as assigned by SOA is not a reliable metric for "sales relative to sales in the market," at least in a market where the Group's success in selling other line/makes inadvertently penalizes Bert Ogden Subaru by driving up its MSR requirement.

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III.
TERMINATION IS NOT INTENDED FOR THIS DEALER

BERT OGDEN SUBARU'S PERFORMANCE

Year	Total Sales[10] Revenue	Number of Vehicles Sold[11]	OLP - Purchase[12]	OLP - Service[13]	Denied Warranty Claims[14]	Denied Recall Claims[15]
2017	**$13,972,889**	325	892 Extraordinary	917 Extraordinary	0	0
2018	**$15,116,263** (8.2% growth)	344 (5.8% growth)	776 Extraordinary	819 Extraordinary	0	0
2019	**$16,387,078** (8.4% growth)	352 (2.3% growth)	810 Extraordinary	803 Extraordinary	0	0
2020	**$22,124,861** (35% growth)	432 (22.7% growth)	785 Extraordinary	791 Extraordinary	0	0
2021	Not in Evidence	Approximately 500 (15.7% growth)				

10 See Exhibit 489.
11 Exhibit 172; Hearing Record at page 1866, ll7-19 (2021).
12 Exhibit 43.
13 *Id*.
14 Hearing Record at Page 1875, ll 14-22.
15 Hearing Record at Page 1875, ll 23-25.

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BERT OGDEN SUBARU SOLD ALL IT WAS GIVEN TO SELL

YEAR ENDING	ALLOCATED[16]	SOLD[17]
2017	339	325
2018	319	344
2019	357	352
2020	409	432

16 Exhibit 141.
17 Exhibit 172.

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BERT OGDEN SUBARU
REQUESTED ADDITIONAL INVENTORY

DATE	EXHIBIT NO.	INVENTORY REQUEST MADE BY BERT OGDEN
6/17/2009	310	**To sell 40-50 units per month, Bert Ogden Subaru needs a new vehicle inventory of 80-90 units on the ground.**
8/5/2011	325	**"I desperately need more inventory now…"**
1/23/2017	435	**"I fail to understand how I can be expected to maintain Minimum ales Responsibility (MSR) without the necessary product from the manufacturer to do so."**
12/17/2018	408	**"Our most significant constraint continues to be inventory."**
6/19/2019	409	**"It's hard to sell out of an empty wagon."**
5/11/2020	356	**GM Geoff [Mauldin] expressed that he does not think it is possible to reach MSR without a substantial increase in inventory.**
8/28/2020	410	**"Without additional inventory it becomes almost impossible to grow out volume levels…"**

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BERT OGDEN SUBARU'S STAFFING[18]

2019[19]

PERSONNEL	DESCRIPTION	REQUIRED	ACTUAL
P3	Certified Subaru Sales Manager	1	1 Mario Cavazos
P6	Certified/Exclusive Subaru New and Used Consultants	4	4 Armando Ramirez, Noel Gonzales, Mike Perez and Cody Sanchez
P10	Service Manager Designation	Exclusive	Exclusive
P12	Service Advisor Designation	Exclusive	Exclusive

2020[20]

PERSONNEL	DESCRIPTION	REQUIRED	ACTUAL
P3	Certified Subaru Sales Manager	1	1 Jose Gill
P10	Service Manager Designation	Exclusive	Exclusive
P12	Service Advisor Designation	Exclusive	Exclusive

2021[21]

PERSONNEL	DESCRIPTION	REQUIRED	ACTUAL
P3	Certified Subaru Sales Manager	1	1 Jose Gill
P10	Service Manager Designation	Exclusive	Exclusive
P12	Service Advisor Designation	Exclusive	Exclusive

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18 Only those categories for which SOA raised any issue are addressed.

19 Exhibit 17; Hearing Record at page 1685, ll 23-25; page 1686, ll 1-25; page 1687, ll 1-25; page 1988, ll 1- 25; page 1689, ll 1-15.

20 Exhibit 18; Hearing Record at page 1690, ll 1-25; page 1691, ll 1-9.

21 Exhibit 19; Hearing Record at page 1691, ll 10-25; page 1692, ll 1-25; page 1693, ll 1-25; page 1694, l 1.

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The PFD did not reference or attempt to challenge much of the evidence set out above[22] but the punitive remedy of termination calls for these facts about this AOR - and of Bert Ogden Subaru's performance – to be considered and addressed.

The notion that Bert Ogden Subaru is arguing that termination is improper due to post NOIT operations is not based on the record and is a mischaracterization of its contentions. Bert Ogden Subaru offered evidence, which was largely ignored in the PFD, that its operational record for years ***prior to and subsequent*** to the NOIT disproved "good cause" to terminate Bert Ogden Subaru.[23]

The PFD ignored the continuous growth in overall sales revenue, the continuous and uninterrupted growth in overall vehicle sales and an Owner Loyalty Program ("OLP") which scored Bert Ogden Subaru as "Extraordinary" based on the scale and survey developed and used by SOA for at least the four years prior to the NOIT. The PFD also ignored that the OLP metric relied upon by SOA was abandoned by SOA.

In short, SOA seeks to terminate Bert Ogden Subaru with respect to:

1) an alleged OLP minimum required scoring metric not expressly identified in any written agreement bargained-for by SOA and/or agreed to by Bert Ogden Subaru; and

2) an OLP format that was abandoned by SOA prior to this hearing

Critically, despite SOA bearing the burden of proof on the issue, SOA offered no evidence and the ALJs made no finding that Bert Ogden Subaru personnel were not otherwise "adequate"

[22] See Appendix 1.

[23] On July 8, 2022, SOA finally completed an inspection of the Bert Ogden facilities and operations and confirmed that the prior SOA completed MSOGs were incorrect and set out erroneous information, as argued by Bert Ogden Subaru at the Hearing.

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in relation to those of other dealers, as the statutory criteria would require.[24] Despite this failure, the PFD criticizes Bert Ogden Subaru for not offering evidence related to its ability to sell vehicles if it were fully staffed. This criticism not only inverts the burden of proof, but ignores the fact that Bert Ogden Subaru did offer evidence that it was fully staffed for the time period of 2019 through 2021, and evidence of the resulting growth of sales both in terms of units and revenue during that time period.

IV.
SOA'S ALLOCATION AND MARKETING SYSTEM PLACE BERT OGDEN SUBARU AT A DISADVANTAGE

A. Historical Sales in the Market Demonstrate the SOA Vehicle Allocation is Not Workable- and Bert Ogden Subaru Has Pointed This Out to SOA To No Avail

The PFD assumes that a dealer must accept SOA's system of allocation and low "on the ground" inventory, rather than SOA accommodating a dealer that prefers a different system- even when that dealer has far more experience and expertise in selling cars in the market area. For purposes of illustration, the Bert Ogden Group has 23 franchises and 19 dealerships in the RGV, while SOA has only 13 dealerships in all of District 3 of the DFW Zone. SOA urges that the "good cause" factor “sales relative to sales in the market” must incorporate the unique SOA allocation system, but the numerous other US and foreign manufacturers for whom the Bert Ogden Group markets cars clearly do not consider SOA's low inventory model that to be the only or the best system.

Page 13 of the PFD quotes Casey Griffin’s (SOA’s Central Region Vice-President)

[24] The information included on the Minimum Standards Operating Guidelines (“MSOGs”) and which were completed by SOA and used to argue Bert Ogden Subaru’s claimed non-compliance were wildly inaccurate for at least the prior four years. These inaccuracies came despite SOA knowing that the information was incorrect. It was only after the hearing that SOA conducted a formal inspection and review and issued Bert Ogden Subaru a completely compliant report.

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testimony that he did not think Mr. Vackar had a good understanding of Subaru's business model and philosophy. The PFD fails to note the evidence in the record that SOA and Mr. Griffin did not have a good understanding of the Bert Ogden Group's highly successful business model and philosophy. The first evidence of SOA misunderstanding the local sales model came back in 2009 when the Bert Ogden Subaru dealer principal wrote to SOA that to sell 40 to 50 units per month, Bert Ogden Subaru would need a new vehicle inventory of 80 to 90 units on the ground[25]. Subaru ignored that information, and never provided that level of inventory.

Put another way, the PFD puts all the burden on the dealer to accommodate to SOA, and no burden on SOA to accommodate a dealership group with a multi-decade record of success selling cars at 18 other successful dealerships in the RGV. Whether or not SOA has a legal or business obligation to adapt to the marketing system and strategy of this dealer, SOA should not be allowed to terminate a dealer simply because it (SOA) has a unique allocation and inventory system that has never been proven to work at an RGV dealership.

The PFD did properly reject SOA's assertion made in the NOIT that Bert Ogden Subaru's Owner Loyalty Program ("OLP") scores amounted to a breach of the franchise agreement. However, the PFD erroneously adopted the SOA claim that Bert Ogden Subaru was a "poor" performing dealer based on its relative ranking with other Subaru dealerships. In doing so, the PFD ignored that SOA had never adopted or promulgated a franchise term or other policy that a dealer could be terminated based on relative OLP scores. Nor did the PFD mention the highly relevant evidence from the hearing that the "single satisfaction question" OLP program which Subaru relied on to urge termination of this dealer (and accepted in the PFD) had been abandoned by SOA approximately two weeks before the commencement of the hearing.

[25] Exhibit 310.

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B. SOA Based Its Case on Selectively-Edited Evidence Which Concealed the Approximate 95% Positive Customer Narratives

SOA did not present this Tribunal with relevant and probative evidence on the question of customer satisfaction. Instead, it took its electronic scissors to that evidence and selectively-edited it to remove everything favorable to Bert Ogden Subaru. To cast Bert Ogden Subaru in the most unfavorable light, SOA edited customer narratives by removing the approximate 95% that were positive, leaving only a litany of complaints. Troy Poston, SOA's manager responsible for Bert Ogden Subaru for most of its time as a SOA dealer, testified as follows:

> **Q: "Mr. Poston, it would be unfair – if Subaru edited out all of the positive comments and left only the negative comments to the OLP narratives it has marked as exhibits in this case, which would be unfair and misrepresent Bert Ogden's true performance, true?**
>
> **A: True."[26]**

Like the testimony concerning the inapplicability of MSR, this evidence was not addressed in the PFD. The credible customer satisfaction evidence, which took into account actual satisfaction surveys by actual Bert Ogden customers, established that Bert Ogden Subaru had been rated "Extraordinary" in both Purchase and Service since at least 2017. By relying on cherry picked and anonymous "negative only" online reviews in the place of SOA's own customer satisfaction surveys, the PFD lets bad evidence chase out the good.

Franchise termination is a harsh and punitive action, which destroys most of a dealership's value, and the Occupations Cod makes it clear that the Legislature intended for termination to occur only after a careful and even-handed assessment of "all existing circumstances." This PFD, in its present configuration, does not contain such a careful and even-handed assessment,

[26] Hearing Record at page 189, ll 23-25 and page 190, ll 1-4.

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and it is nowhere more arbitrary and unbalanced than in its acceptance of SOA's selective evidence on customer satisfaction and its acceptance of "comparative" rankings in place of actual customer satisfaction ratings.

V.
SOA'S METRIC OF MSR- THROUGH SEGMENTATION IS UNRELIABLE

A. Overview of What SOA Contends that MSR – through "Segmentation" - Is

SOA (and its expert witness, Sharif Farhat) attempt to create the facade that MSR is the controlling factor which impacts dealership sales in the Pharr AOR. SOA and Farhat argue that MSR – through the concept of segmentation - takes into account all differences in markets. The premise of SOA's argument(s) is the misplaced claim that MSR - through segmentation - is a reliable benchmark and, as such, this Tribunal should ignore the following:

1) Demographic differences between markets; and

2) Brand preferences between markets.

The premise of SOA's reliance upon the theory that MSR – through segmentation – is the controlling factor which impacts dealership sales in the Pharr AOR is as follows:

- **MSR (through segmentation) is saying that the probability is exactly the same that somebody anywhere in the District or Zone (depending on which is used as the benchmark) will buy a Subaru Outback as they will a comparable General Motors offering**

Segmentation is not a reliable metric. The premise of SOA's argument as to MSR is that the black box referred to as "segmentation" controls for all variables and/or differences between markets (e.g. demographic factors, brand preferences). The Post-Trial Briefs submitted to the Tribunal on behalf of Bert Ogden Subaru were long – and this length may have diluted their critical points regarding the flaws of segmentation. As Blaise Pascal (mathematician and physicist) wrote:

> **"I have only made this letter longer because I have not had the time to make it shorter."**

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The gravamen of SOA's view regarding the efficacy of MSR – through "Segmentation" is as follows:

1) SOA argues that MSR – through "Segmentation" - is a reliable Metric through which to measure Dealership Sales Performance;

2) SOA argues that the concept of MSR – through "Segmentation" - takes into account the differences in:

   a) demographic factors and

   b) brand preferences between markets in evaluating Dealership Sales Performance;

3) SOA argues that because it believes MSR – through "Segmentation" – takes into account and/or controls for all: a) demographic factors and b) brand preferences between markets, there is no need to further evaluate and/or consider these variables

B. MSR is a Flawed Metric – Regardless of Whether Used in the Context Of:

1) An Allegation of Breach of the Franchise Agreement; and/or

2) An Analysis of "Sales in relation to sales in the Market"

The flaws which preclude the application of MSR as an appropriate metric for Bert Ogden Subaru's compliance with the Franchise Agreement are not rectified by the PFD's use of the same metric for its analysis of "sales in relation to sales in the market." As discussed below, and consistent with the holdings in *Beck Chevrolet* and *Bates Nissan*, MSR is as flawed a metric for purposes of breach of contract issues as it is for assessing a dealer's sales in relation to the market. The underlying flaw of MSR in each case is the same. It wholly fails to take into account local market preferences.

The classic example of MSR as a flawed metric was the Detroit market and imported car sales. At one point, the economy of the Detroit area was based on the manufacture of cars by the US Big Three: Ford, GM, and Chrysler. People associated with the US auto industry had an

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understandable consumer preference for the cars made by the companies that employed them and tens of thousands of their neighbors. It was not impossible to sell a Toyota or Datsun in Detroit in the 1970s, but no fair-minded observer could deny that local market preference made selling imports an uphill fight.

The same general scenario is applicable to sales of Subarus in the Pharr AOR. In addition to the fact that Subarus have never - over a fifty-year period - sold well in the Rio Grande Valley ("RGV"), the brand is little known among the predominantly Hispanic (including both Mexican American and Mexican national consumers), and none of the demographic factors that favor Subaru sales exist in the RGV or the Pharr AOR.

Furthermore, manufacturer/dealer franchises typically require a dealer to "effectively sell" the covered line/make in the dealer's AOR, or other defined sales territory.

In the franchise agreement at issue in this proceeding, the dealer agreed to "effectively sell Subaru Products to customers located in the Area of Responsibility." Sec. 10.2, "*Sales Performance*."

That same section states that dealer's performance "*will be evaluated by the Distributor on the basis of such reasonable criteria as Distributor may develop from time to time, including, but not limited to, those reasonable sales objectives that Distributor may establish and a comparison of Dealer's sales performance with other Subaru dealers."* (emphasis added).

In fact, the only sales performance "criteria" that SOA ever used to evaluate Bert Ogden Subaru was MSR scores, and in particular its MSR scores in comparison to those of other Subaru dealers.

Even the 2017 Sales Performance Addendum that SOA required Bert Ogden Subaru to enter into was just a variation of SOA's reliance on MSR as its sole criteria for dealer's sales

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performance. That agreement imposed sales requirements of 50%, 60% and 70% of the dealer's MSR over a three year period.

It is a distinction without a difference to say that *Beck* and *Bates Nissan* are not relevant authority on the validity of MSR as a metric in this case because those cases criticize and reject MSR "as a contractual performance criteria" while SOA invokes MSR in this case as a metric for "sales relative to sales in the market." In fact, SOA relies on MSR for both criteria- contractual performance and "sales relative to sales in the market."

In both scenarios - Bert Ogden Subaru's contractual compliance (including under the Sales Performance Agreement) and its "sales relative to sales in the market" - MSR is the same metric. In both scenarios, MSR fails as a valid metric due to the same basic flaw: it does not take into account local market preferences either in the way it is calculated or in the way it is used as an evaluation tool. This is true because SOA sets a dealer's MSR requirement based on how Subarus sells in comparison to other makes in a much wider area than that dealer's AOR. Before 2017, that much wider area consisted of about 43 Subaru AORs around Texas, New Mexico, Louisiana, Oklahoma, Arkansas and Mississippi. After 2017, SOA set a dealer's MSR requirement based on Subaru's comparative sales in 13 AORs, none of which shared the unique characteristics, brand preferences, and market demand profile of the Pharr AOR.

SOA then again relied on MSR to evaluate Bert Ogden Subaru by comparing its MSR *scores* to the MSR scores of Subaru dealers throughout the multi-state DFW Zone, which only compounded the underlying flaw arising from the fact that MSR fails to address local market preferences. Since MSR scores are based on sales a dealer makes in its AOR as well as sales it makes outside of its AOR, the use of MSR scores as a comparative metric was skewed unfairly against Bert Ogden Subaru because of its unique geographic disadvantage limiting sales outside

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its AOR. A review of the forty plus AORs in the DFW Zone identified in SOA exhibits and expert testimony show that no other AOR is bounded on one side by a foreign nation (Mexico) where the dealer cannot sell cars, on another side by an ocean (the Gulf of Mexico), and on the other side by an extensive and thinly populated desert. While the evidence showed that Bert Ogden Subaru did achieve some sales outside of its AOR, it also showed that Subaru dealers in more favorable locations, including highly urbanized areas, were in a position to boost their MSR scores well above their competitors' scores by selling to customers in the populated areas outside their AORs.

SOA's methodology for 1) setting a dealer's MSR requirements and 2) calculating a dealer's MSR scores does nothing to address the effect of local market preferences of this dealer's AOR. This is precisely the issue raised in *Beck* and *Bates Nissan*. Just as MSR is an unreliable metric for determining contractual compliance, it is an unreliable metric for assessing the sales of a dealer in the RGV "relative to sales in the market."

C. "Segmentation" Is Not the Panacea Proclaimed by SOA

SOA contends that MSR – through "Segmentation" is a panacea which precludes consideration of: a) demographic factors and/or b) brand preferences between markets. Segmentation is not a panacea. On the contrary, SOA's own documents demonstrate that segmentation is flawed, unreliable and contradicts the foundation of the opinions of SOA's expert witnesses.

The PFD's discussion of the flaws raised by Bert Ogden Subaru (see pp. 25 and 26 of the PFD) fails to address the seminal point raised - segmentation, as used by SOA, is wholly unreliable as a way of predicting what each model within a segment will sell in any given market.

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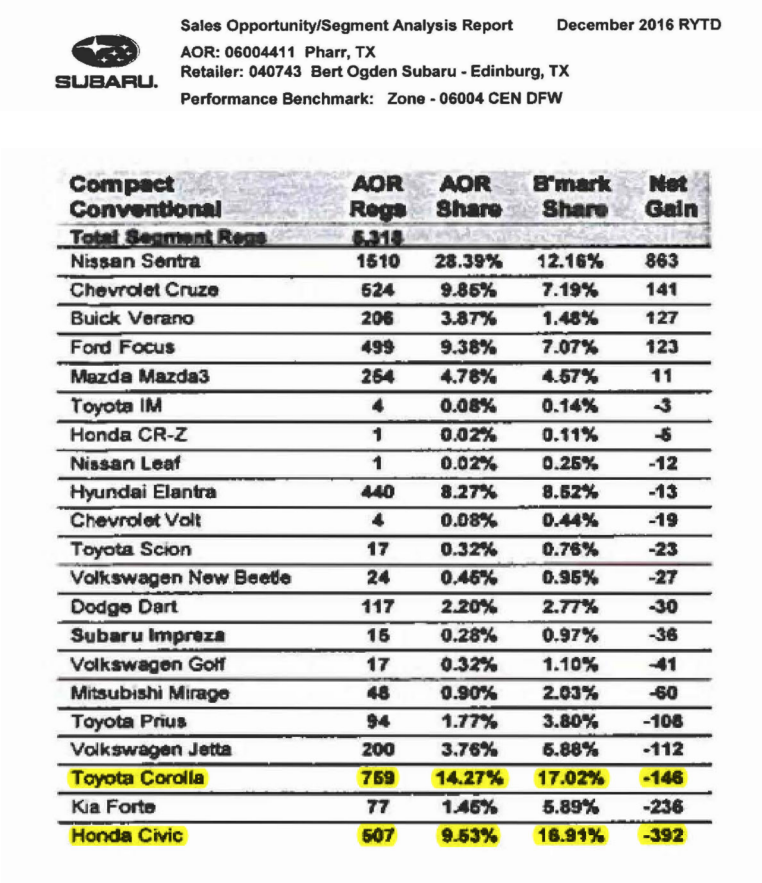
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D. The Premise of "Segmentation" is the Identification of "What Sales Are Expected" – But this Premise is Erroneous and Flawed – as Demonstrated by SOA's Own Document ► the Sales Opportunity/Segment Analysis Report

The premise of SOA (and its experts at Urban Science) is that segmentation analysis based on the District or the Zone is predictive within any segment of ***"what sales are expected"*** in any given AOR. If that were true, there would be numerous examples of AORs in which the sales of a given model tracked, at least generally, the sales percentages for that same model in the District or the Zone. Instead, the data analyzed by Bert Ogden Subaru expert witness Joe Roesner showed conclusively that- at least in the Pharr AOR- models sold by locally preferred makes (like Nissan) sold more than twice the "expected" number of cars, while sales by other less preferred makes (like Hondas and Subaru) sold less than half the "expected" number. By way of example, the December 2016 and December 2017 SOA-prepared SOSA Reports demonstrate sales of vehicles wildly above and wildly below the benchmark. Stated another way, the SOSA Reports demonstrate sales wildly above and wildly below ***"what sales are expected"*** using the SOA segmentation model.

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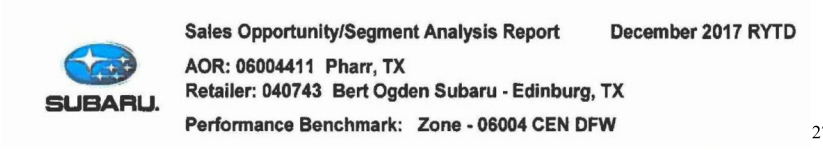
SUBARU.

Sales Opportunity/Segment Analysis Report December 2016 RYTD
AOR: 06004411 Pharr, TX
Retailer: 040743 Bert Ogden Subaru - Edinburg, TX
Performance Benchmark: Zone - 06004 CEN DFW

Compact Conventional	AOR Regs	AOR Share	B'mark Share	Net Gain
Total Segment Regs	5,318			
Nissan Sentra	1510	28.39%	12.16%	863
Chevrolet Cruze	524	9.85%	7.19%	141
Buick Verano	206	3.87%	1.48%	127
Ford Focus	499	9.38%	7.07%	123
Mazda Mazda3	254	4.76%	4.57%	11
Toyota IM	4	0.08%	0.14%	-3
Honda CR-Z	1	0.02%	0.11%	-5
Nissan Leaf	1	0.02%	0.25%	-12
Hyundai Elantra	440	8.27%	8.52%	-13
Chevrolet Volt	4	0.08%	0.44%	-19
Toyota Scion	17	0.32%	0.76%	-23
Volkswagen New Beetle	24	0.45%	0.95%	-27
Dodge Dart	117	2.20%	2.77%	-30
Subaru Impreza	15	0.28%	0.97%	-36
Volkswagen Golf	17	0.32%	1.10%	-41
Mitsubishi Mirage	48	0.90%	2.03%	-60
Toyota Prius	94	1.77%	3.80%	-108
Volkswagen Jetta	200	3.76%	6.88%	-112
Toyota Corolla	759	14.27%	17.02%	-146
Kia Forte	77	1.45%	5.89%	-236
Honda Civic	507	9.53%	16.91%	-392

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Sales Opportunity/Segment Analysis Report December 2017 RYTD

AOR: 06004411 Pharr, TX

Retailer: 040743 Bert Ogden Subaru - Edinburg, TX

Performance Benchmark: Zone - 06004 CEN DFW

[27]

Compact Conventional	AOR Regs	AOR Share	B'mark Share	Net Gain
Total Segment Regs	4,890			
Nissan Sentra	1404	28.71%	11.64%	835
Ford Focus	648	13.25%	7.78%	268
Chevrolet Cruze	447	9.14%	7.63%	79
Nissan Rouge Sport	161	3.29%	2.12%	67
FORD C-MAX	25	0.51%	0.38%	6
Buick Verano	26	0.53%	0.48%	2
Hyundai Ioniq	11	0.22%	0.38%	-8
Dodge Dart	23	0.47%	0.75%	-14
Volkswagen Golf CUV	2	0.04%	0.36%	-16
Chevrolet Volt	3	0.06%	0.39%	-16
Toyota IM	19	0.39%	0.94%	-27
Volkswagen New Beetle	19	0.39%	0.95%	-28
Hyundai Elantra	421	8.61%	9.19%	-28
Volkswagen Golf	5	0.10%	0.81%	-35
Mitsubishi Lancer	13	0.27%	0.99%	-36
Mazda Mazda3	166	3.37%	4.26%	-43
Subaru Impreza	20	0.41%	1.67%	-62
Volkswagen Jetta	214	4.38%	6.08%	-83
Toyota Prius	80	1.64%	3.54%	-93
Toyota Corolla	532	10.88%	14.61%	-183
Kia Forte	78	1.60%	6.60%	-245
Honda Civic	574	11.74%	18.43%	-327

The MSR/Segmentation model is based on a prediction of ***"what sales are expected."*** If virtually no model within a segment is selling at the "expected" level, then the model is not reliable and not valid. The December 2016 and December 2017 SOSA Reports (as well as those for December 2018, December 2019 and December 2020) demonstrate that virtually no model within a segment sold at the "expected" level. Put more simply, what sells in the District as a whole or the Zone as a whole ***is not predictive of what sells in the Pharr AOR***.

[27] Each SOSA Report demonstrates that the "segmentation" theory relied upon by SOA and its expert witness (Sharif Farhat) is unreliable:

1) A theory is not reliable when the theory relies upon a document (here, the SOSA Report(s)) which expressly contradicts the theory;

2) When a theory about what sales performance "is expected to occur" or "ought to occur" (utilizing segmentation analysis) is expressly contradicted by the proponent's own document (here, the SOSA Report(s)), the theory is proven as flawed and unreliable;

3) This is not a case where a theory is evaluated and contradicted by reference to parole evidence, and/or extraneous documents. Here, the very document created by SOA (the SOSA Report(s)) expressly contradict SOA's theory and demonstrates it is not reliable.

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There can be different reasons or hypotheses why SOA's model is not at all predictive, but if it is not predictive the reasons why the model fails are not that important. The fact that the model fails is important. If the model fails, it cannot be be a valid rationale for arguing or finding as a fact that Bert Ogden Subaru sales are not satisfactory "relative to sales in the market." The bottom line is that the SOA's own SOSA Reports expressly contradict any notion the actual sales will be incongruent with "what sales are expected" by SOA. It follows:

- **A benchmark is not a benchmark when the actual sales data demonstrate that sales are not congruent with the benchmark**

For SOA (and its expert witness, Sharif Farhat), segmentation controls for everything. However, the information reflected in the ***SOSA Reports*** demonstrate that the SOA argument that MSR – through segmentation - takes into account all differences in markets is flawed. When reviewing the SOSA Reports from 2014 to 2020 (see **Appendix A** to the Post-Hearing Reply Brief of Bert Ogden Subaru), the objective facts and data demonstrate that the theory of SOA and Mr. Farhat is not supported by the underlying factual data. The unreliable nature of MSR – through segmentation - is seen in looking at each SOSA Report. One cannot reconcile the opinions proffered by SOA expert witness, Sharif Farhat, with the underlying factual data contained in the written SOSA Reports (reports which are prepared utilizing the premise of "segmentation"):

1) SOA claims that MSR – through segmentation - is a reliable benchmark;

2) If MSR – through segmentation - were a reliable benchmark, then the sales documented in each SOSA Report would be concentrated at or near the benchmark;

3) The factual data contained in the SOSA Reports (for the time periods of 2014 to 2020) clearly demonstrate that sales are not concentrated at or near the benchmark. Rather, the sales within each alleged "segment" vary wildly above and below the purported benchmark;

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4) The lack of concentration of sales at the purported benchmark demonstrates that MSR – through segmentation - is not a reliable benchmark and/or metric;

5) Because there is no concentration of sales at the benchmark means that MSR – through segmentation - is not a benchmark.

Stated more bluntly**,** a benchmark is not a benchmark when the data demonstrates sales figures wildly above and wildly below it.

E. SOA's Data Demonstrates "Segmentation" Is Not Reliable

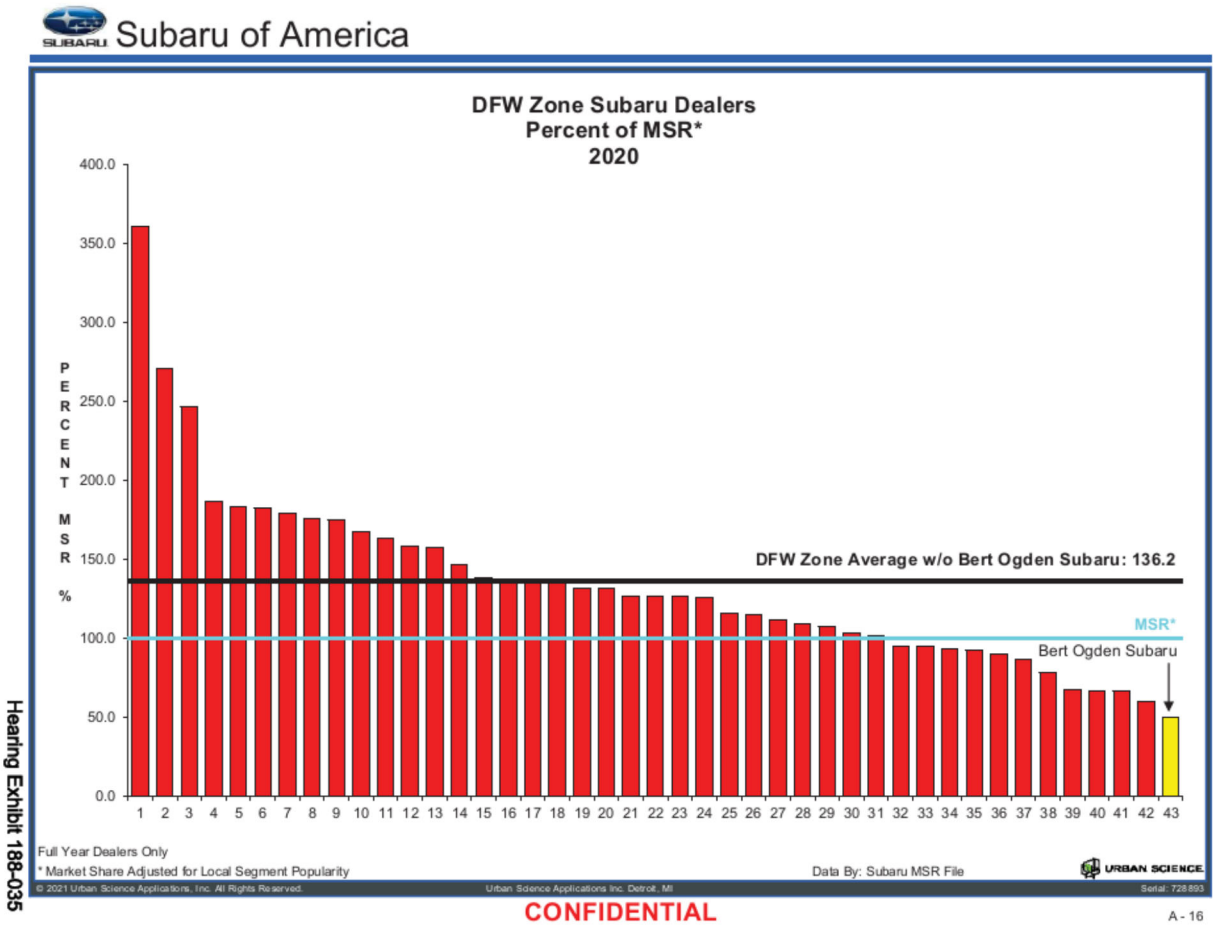
Joe Roesner, the expert retained by Bert Ogden Subaru, looked at the chart below (prepared by SOA's expert witness, Sharif Farhat) and explained as follows:

- **"if MSR was truly picking up all variations outside of a dealer's control in its calculations" then you would expect to see one or more dealers on the light blue line in Exhibit 188.**[28]

[28] Hearing Record at page 2224, l 13 to page 2225, l 5.

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Because of the nature of the data in Exhibit 188, Joe Roesner explained that "other facts than just MSR are driving sales."[29]

Further, each and every SOSA Report for the years 2014 through 2020 is evidence that the theory and the model proffered by SOA and Sharif Farhat are contradicted by the underlying facts and data assembled by SOA in reports addressing the precise subject matter in question – segmentation.

The evidence about what other makes and models Subaru buyers considered is relevant but not dispositive. What is essential is that a predictive model that fails to predict reality is not a

[29] Hearing Record at page 2225, ll 4-5.

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reliable or valid model. This unreliable metric, which fails to predict the actual market experience, cannot underpin a valid finding of fact on the issue of "sales relative to sales in the market" to terminate a strong and performing dealer, like Bert Ogden Subaru[30].

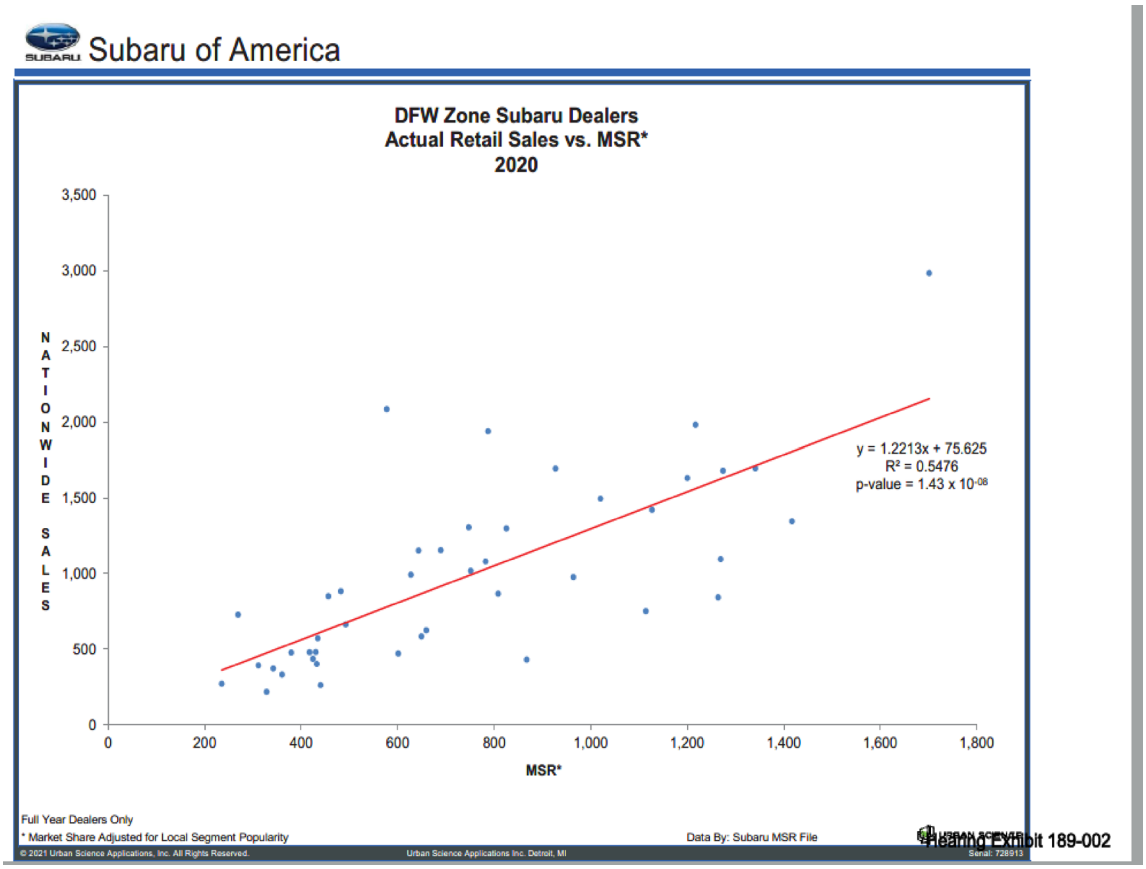
F. The Regression Analysis Prepared by SOA's Expert (Sharif Farhat) Demonstrates that Factors Other Than MSR Share a Relationship With Dealership Sales

The version of a Regression Analysis prepared by SOA's own expert witness (Sharif Farhat) – which is not intentionally manipulated (by forcing the "Y Intercept" to Zero – makes clear that **over 46% of the variation in Dealership Sales are not related to MSR**. To be clear, SOA's own expert witness has prepared a Regression Analysis which readily admits that over 46% of the variation in Dealership Sales is related to a factor **other than MSR**. Therefore, over 46% of Dealership Sales are correlated to some factor (or factors) other than MSR – through "Segmentation". See ***Exhibit 189-002*** below:

[30] Texas law is clear that unreliable expert witness testimony is no legally no evidence. *See e.g. Seger v. Yorkshire Ins. Co.*, 503 S.W.3d 388, 410 n. 3 (Tex. 2016).

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G. Texas Case Law Demonstrates that "Segmentation" is Not a Panacea Capable of Sufficiently Accounting for All Measurable Differences in Factors

When the Regression Analysis was not manipulated by SOA's expert, it made clear that over 46% of the variation in Dealership Sales is related to a factor **other than MSR**. Therefore, segmentation does not sufficiently account for all measurable differences in factors.

Albeit a protest action with respect to the establishment and relocation of a Chevrolet dealership to the north Houston area, the case of *Austin Chevrolet, Inc. v. Motor Vehicle Board*, 212 S.W.3d 425 (Tex. App. – Austin 2006, *pet. denied*) took the opportunity to evaluate and opine upon segmentation analysis. When addressing the "Adequacy of Representation" element in the Houston Market (under Texas Occupations Code §2301.652(a)(1) (in the context of a dispute between the parties as to the Texas Average Adjusted ["TAA"] and the Texas Multiple Dealer

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Area ["MDA"]) the Austin Court of Appeals notes that "Landmark (Chevrolet) disputed that segmentation was capable of refining the TAA standard to account for the profound differences between the MDAs and the SDAs. 212 S.W.3d at 436. In evaluating the expert witness reports submitted, the Austin Court of Appeals noted that "the Board agreed that Anderson's (expert witness for a party) segmentation analysis did not sufficiently account for all measurable differences." 212 S.W.3d at 436-437. Therefore, in a reported decision, the Austin Court of Appeals has held that segmentation is not *ipso facto* the analytical tool the manufacturer claimed that it was.

VI.
THE PFD FAILS TO CAPTURETHE NATURE, QUANTITY AND SIGNIFICANCE OF HOW SOA IMPACTS SALES PERFORMANCE WITH ITS TENDER OF MAUI & SSLP VEHICLES

A. Pages 32 to 38 of the PFD Fail to Capture the Nature, Quantity and Significance of How SOA Impacts Sales Performance With Its Tender of MAUI & SSLP Vehicles

In pages 32 to 38, the PFD discusses how MAUI vehicles were provided by SOA to dealers. The PFD makes the following two (2) conclusory points which ignore critical evidence regarding MAUI vehicles and SSLP vehicles – each distributed at the discretion of SOA:

#1: <u>Page 15 of PFD</u>:

> **"Since the termination notice was issued, Bert Ogden increased its sales. For a few months, it was a significant increase. Beginning around August or September 2020, Bert Ogden's sales performance almost doubled in a 90-day period. Since that time, however, the rate has slowed down."**

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#2: Page 36 of PFD:

> **"From 2016 through January 2021, Bert Ogden received a total of 417 MAUI units, which was the 18th largest number of total MAUI vehicles in the DFW Zone. Bert Ogden argues that the dealership did not receive enough MAUI units until October and November 2020 – after it received the termination notice – and that its increased sales at that time reflect that it finally had sufficient inventory. Yet the evidence showed a fairly consistent number of MAUI units over the years – 92 in 2016, 80 in 2017, 76 in 2018, 86 in 2019 and 78 in 2020. As SOA points out, the evidence shows a dramatic sales increase beginning in August and September 2020, a time when it received no MAUI units."**

The PFD fails to take into account critical evidence regarding the following types of inventory provided by SOA to Bert Ogden Subaru and other dealerships in the Zone and/or District:

i) MAUI;

ii) SSLP

B. SOA's Second Trial Witness – Zone Director Dave Adams – Made a False Statement About the Number of MAUI Vehicles Provided by SOA to Bert Ogden Subaru

The PFD's incomplete summary and/or analysis of vehicle inventory provided by SOA to Bert Ogden Subaru likely resulted from a campaign of misinformation which started at the outset of the hearing on the merits when SOA's Zone Director (Dave Adams) testified inaccurately about vehicles provided by SOA to Bert Ogden Subaru. On page 404 of the Transcript Dave Adams gave wholly inaccurate testimony when he stated that Bert Ogden Subaru had received, by far, the most MAUI vehicles:

> **Q: (Mr. Clouatre):**
> **Now let's stay on the MAUI for a second. In relation to other D/FW Zone retailers, how much MAUI did Bert Ogden receive?**
>
> **A: They earned by far the most."**

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Q: And despite receiving the most MAUI of any dealer in the D/FW Zone, now much did that - - you know, did it - - well did it help them meet their MSR?

A: Not at all.

Bert Ogden's expert witness, Joe Roesner, utilized SOA's own data (Exhibit 191.1) to demonstrate that this statement was wrong. Joe Roesner explained how Exhibit 191.1 refuted the contention that Bert Ogden received – by far – the most MAUI units. Specifically, ***Exhibit 510*** demonstrates the number of MAUI vehicles which SOA allocated to each dealer in the D/FW Zone[31]. ***Exhibit 511*** demonstrates the number of SSLP vehicles which SOA allocated to each dealer in the D/FW Zone[32].

Reviewing ***Exhibit 510***, Joe Roesner testified that SOA's own data absolutely refutes the contention Bert Ogden received – by far – the most MAUI vehicles in the D/FW Zone:

Q: Okay. So looking at Exhibit 510, any year did Bert Ogden get the most MAUI vehicles, quote, by far, as suggested by Mr. Adams?

A: No, they did not,……. And just - - you now, even looking just that one dealer, Austin Subaru versus Bert Ogden, you can see there's actually not a single year where Bert Ogden got more. So you couldn't even say that he (Bert Ogden Subaru) got by far the most in any particular year either."[33]

[31] Hearing Record at page 2177, ll 1 to page 2190, ll 6.
[32] Hearing Record at page 2711, ll 1 to page 2190, ll 6.
[33] Hearing Record at page 2189, ll 22 to page 2190, ll 15.

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MAUI Allocation

	Allocation Month						
	2016	2017	2018	2019	2020	2021*	Total
AUSTIN SUBARU	122	201	211	242	145	20	941
FERGUSON SUBARU	174	291	154	135	147	16	917
SCOGGIN-DICKEY SUBARU	124	104	163	154	144	16	705
TEAM GILLMAN SUBARU NORTH	51	181	79	160	205	18	694
FIVE STAR SUBARU	365	58	111	65	82	8	689
GILLMAN SUBARU, INC.	24	186	29	153	232	10	634
SUBARU OF CLEAR LAKE	71	212	100	45	155	0	583
BOB MOORE SUBARU	98	68	118	143	120	12	559
SEWELL SUBARU	106	117	90	101	120	21	555
RANDALL NOE SUBARU	89	42	22	138	227	0	518
ADVENTURE SUBARU	114	61	109	129	90	8	511
SUBARU OF BATON ROUGE	134	40	87	128	93	7	489
EWING SUBARU OF PLANO	0	0	68	160	222	18	468
NORTH PARK SUBARU	29	58	66	251	47	6	457
BRYAN SUBARU	85	89	24	127	123	4	452
SUBARU OF SANTA FE	124	93	62	53	103	13	448
Superior Subaru of Houston	0	0	252	29	133	14	428
BERT OGDEN SUBARU	92	80	76	86	78	5	417
JIM KERAS SUBARU, CO 040229	77	94	74	92	59	0	396
SUBARU OF LITTLE ROCK	117	82	52	92	20	0	363
GILES SUBARU	84	40	24	60	138	13	359
GILLMAN SUBARU	35	28	34	185	56	21	359
BROWN SUBARU	48	32	60	82	102	16	340
BRANDON TOMES SUBARU	49	45	57	71	94	10	326
SUBARU OF GEORGETOWN	68	14	43	63	116	16	320
CLEO BAY SUBARU	148	41	30	41	49	10	319
SUBARU OF PLANO	109	116	86	0	0	0	311
JIM KERAS SUBARU - HACKS CROSS, LLC	0	0	0	267	35	0	302
SUBARU EL PASO	0	0	90	88	119	0	297
NORTH PARK SUBARU DOMINION	39	49	54	58	82	0	282
DOUGLASS SUBARU	0	0	80	55	144	0	279
BALDWIN SUBARU	90	43	12	42	63	22	272
HUDIBURG SUBARU	54	32	47	64	67	6	270
STERLING SUBARU	83	80	9	32	59	3	266
HARVEY SUBARU	71	23	29	25	99	3	250
WEST HOUSTON SUBARU	21	116	13	10	89	0	249
JK SUBARU	71	48	10	43	73	0	245
PAUL MOAK AUTOMOTIVE, INC DBA PAUL MOAK SUBAR	47	50	34	48	50	0	229
HUFFINES SUBARU CORINTH	26	7	62	109	24	0	228
HICKS FAMILY SUBARU	0	0	0	83	126	5	214
PELTIER SUBARU	70	48	16	27	11	5	177
FIESTA SUBARU	0	0	0	24	141	9	174
HILEY SUBARU OF FORT WORTH	29	4	44	51	19	0	147
GARCIA SUBARU EAST 090507	87	13	12	25	0	0	137
GARCIA SUBARU EL PASO	118	17	0	0	0	0	135
JUBILEE MITSUBISHI	60	23	40	0	0	0	123
GARCIA SUBARU NORTH 401607	19	26	7	9	42	11	114
SUBARU OF MIDLAND ODESSA	0	0	15	70	24	0	109
CORPUS CHRISTI SUBARU	25	16	0	0	0	0	41
BASIN SUBARU	21	3	0	0	0	0	24
NORM REEVES SUBARU SUPERSTORE ROCKWALL	0	0	0	0	0	0	0
Sum	3,468	2,971	2,855	4,115	4,367	346	18,122

* The last allocation month available is 1/2021.

SOURCE: The Fortune Group, Inc.
DATA: Manufacturer Allocation Data File (Rules SOA000005).
FILE: MAUISSLP XLSX SMAC-75 THRU 11

PROTESTANT'S EXHIBIT 510

C. The PFD Does Not Discuss SSLP Vehicles – Vehicles Which Have a Significant, Immediate Impact Upon Dealership Sales

SSLP vehicles[34] have a significant and different impact upon dealership sales than MAUI vehicles. The PFD is silent on the issue of SSLP vehicles – a significant omission with respect to a matter which involves a dispute as to what factors impact dealership sales.

Joe Roesner testified that Bert Ogden Subaru received twenty-six (26) SSLP vehicles from 2016 to January of 2021. Of these twenty-six (26) SSLP vehicles, twenty (20) were received after the August 2020 Notice of Intent to Terminate[35]

[34] SSLP is an acronym for Subaru Service Loaner Program.
[35] Hearing Record at page 2207, ll 6 to 10.

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Mr. Roesner explained the significant impact which SSLP vehicles have upon the speed of a dealer's sales:

> **Q: And so how do SSLP vehicles impact the speed of a dealer's sales?**
>
> **A: First off, as soon as they hit the dealership, they are put into servicer loaner status, and in the allocation system that counts as a sale. So rather than waiting for a customer to buy, it's immediately reported as sold for purposes of allocation.**
>
> **So just example, Bert Ogden, those 20 vehicles, if we got - - go down to - - Bert Ogden is down below. In the 20 that came in after the termination actually occurred, we saw the sales spike up because those were immediately reported as sold, which means they come out of inventory and go into the sales rate. As so I've just discussed, that relative to other dealers has an impact of increasing your future allocation."**[36]

In summary, the PFD (in its discussion of sales increases by Bert Ogden Subaru following the August 20, 2020 Notice of Termination) misinterprets the inventory allocation data. The PFD fails to analyze the specific, critical details set forth in ***Exhibit 141*** about the following:

i) What type of Inventory was provided to Bert Ogden Subaru;

ii) When this type of Inventory was provided to Bert Ogden Subaru;

iii) The history when – and how much of – this type of Inventory was provided to Bert Ogden Subaru

The specific answers to the aforementioned questions demonstrate that the sales increases by Bert Ogden Subaru were attributable to SOA's decision to provide each of the following – **which cannot be lumped together as they have different consequences for sales and allocation purposes:**

i) MAUI vehicles; and;

ii) SSLP vehicles

[36] Hearing Record at page 2206, ll 7 to page 2207, ll

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An analysis of ***Exhibit 141*** demonstrates the following:

#1: ***Exhibit 141*** identifies the Inventory Allocation by SOA to Bert Ogden Subaru from January 2015 to February 2021;

#2 ***Exhibit 141*** describes the "type" of Inventory Allocation made by it to Bert Ogden Subaru

a.	**Original VONs provided**
b.	**MAUI vehicles provided**
c.	**SSLP vehicles provided**
d.	**Total Allocated VONs**

#3: In October 2020, SOA provided Bert Ogden Subaru with 15 MAUI vehicles;

#4: In November 2020, SOA provided Bert Ogden Subaru with 30 MAUI vehicles;

#5: Prior to November 2020 (dating back to January 2015), SOA had never previously provided at least 30 MAUI vehicles to Bert Ogden Subaru in one specific month;

#6: In October 2020 and November 2020, SOA provided Bert Ogden Subaru with a total of 45 MAUI vehicles;

#7: This provided of 45 MAUI vehicles is highest number of MAUI vehicles provided by SOA to Bert Ogden Subaru in an consecutive two (2) month time period – dating back to January 2015. Moreover, it took from November 2019 (when 12 MAUI were provided) to July 2020 (when 7 MAUI units were provided) for Bert Ogden Subaru to receive a cumulative total of MAUI vehicles in excess of 45 (from November 2019 to July 2020, a total of 47 MAUI vehicles were provided to Bert Ogden Subaru);

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#8: In November 2020, Bert Ogden Subaru received 20 SSLP vehicles. Prior to November 2020 (and dating back to January 2015), Bert Ogden Subaru had not received at least 20 SSLP Vehicles total – much less in one (1) month. From January 2015 to October 2020, Bert Ogden had only received 5 SSLP vehicles.

Joe Roesner testified regarding the significance of the receipt of 20 SSLP vehicles **after the August 20, 2020 Notice of Termination – and its impact on the sales of Bert Ogden Subaru:**

> **Q: In looking at Exhibit 511, how many SSLP vehicles did Bert Ogden Subaru receive from 2016 to January 2021?**
>
> **A: Received a total of 26, 20 which occurred after the termination, notice of termination.**[37]
>
> **……**
>
> **Q: And so how do SSLP vehicles impact the speed of a dealer's sales?**
>
> **A: First off, as soon as they hit the dealership, they are put into service loaner status, and in the allocation system that counts as a sale. So rather than waiting for a customer to buy, it's immediately reported as sold for purposes of the allocation.**
>
> **So just example, Bert Ogden, those 20 vehicles, if we got - - go down to - - Bert Ogden is down below. In the 20 that came in after the termination actually occurred, we saw the sales spike up because those were immediately reported as sold, which means they come out of inventory and go into the sales rate. And so as I've just discussed that relative to other dealers has an impact of increasing your future allocation."**[38]

D. The PFD Fails to Address How a Dealership in a "Case Study" Promoted by SOA's Expert Witness Was the Beneficiary of Substantial SSLP Vehicles

SOA's campaign of misinformation (initiated by the testimony of Zone Director, Dave Adams) continued with purported "case studies" (by SOA expert witnesses) on vehicle inventory provided to other dealerships. The Baton Rouge dealership was the subject of one such ad case study . The SOA expert witness argued that a change in ownership and management at the Baton Rouge Dealership was the impetus for increased dealership sales. However, the data in Exhibit

[37] Hearing Record page 2207, ll 6 to 10.
[38] Hearing Record page 2206, ll 7 to 22.

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151 demonstrates that the Baton Rouge dealership received substantially more SSLP vehicles in that time frame than did Bert Ogden Subaru – a point SOA chooses to ignore.

SSLP Allocation

	Allocation Month						
	2016	2017	2018	2019	2020	2021*	Total
AUSTIN SUBARU	89	125	169	236	127	20	766
FERGUSON SUBARU	98	79	108	101	126	16	528
SEWELL SUBARU	94	113	84	95	105	16	507
BOB MOORE SUBARU	71	60	94	126	108	12	471
SCOGGIN-DICKEY SUBARU	52	85	101	110	92	12	452
SUBARU OF GEORGETOWN	57	12	30	61	108	16	284
ADVENTURE SUBARU	57	18	7	83	68	8	241
SUBARU OF PLANO	67	80	74	0	0	0	221
BRANDON TOMES SUBARU	32	21	38	48	71	10	220
JIM KERAS SUBARU, CO 040229	50	36	29	53	50	0	218
EWING SUBARU OF PLANO	0	0	12	77	102	18	209
TEAM GILLMAN SUBARU NORTH	21	10	10	48	93	18	200
FIVE STAR SUBARU	15	9	30	58	67	8	187
NORTH PARK SUBARU	24	29	31	54	36	6	180
PAUL MOAK AUTOMOTIVE, INC DBA PAUL MOAK SUBAR	36	29	33	33	45	0	176
GILLMAN SUBARU, INC.	18	10	18	45	69	10	170
NORTH PARK SUBARU DOMINION	19	24	9	42	71	0	165
BRYAN SUBARU	34	37	12	36	39	4	162
RANDALL NOE SUBARU	55	20	18	24	30	0	147
HUDIBURG SUBARU	44	25	24	10	35	6	144
SUBARU OF BATON ROUGE	13	10	27	49	41	2	142
SUBARU OF SANTA FE	24	19	31	32	27	3	136
BROWN SUBARU	9	13	24	39	39	6	130
SUBARU OF CLEAR LAKE	23	13	15	30	47	0	128
BALDWIN SUBARU	29	18	11	20	22	15	115
GILES SUBARU	5	7	10	14	58	8	102
GILLMAN SUBARU	16	10	0	0	43	16	85
SUBARU EL PASO	0	0	20	29	26	0	75
HILEY SUBARU OF FORT WORTH	3	4	30	23	14	0	74
HICKS FAMILY SUBARU	0	0	0	19	44	0	63
FIESTA SUBARU	0	0	0	0	57	4	61
JIM KERAS SUBARU - HACKS CROSS, LLC	0	0	0	21	31	0	52
HUFFINES SUBARU CORINTH	19	0	6	11	16	0	52
Superior Subaru of Houston	0	0	0	24	23	4	51
SUBARU OF LITTLE ROCK	27	19	5	0	0	0	51
SUBARU OF MIDLAND ODESSA	0	0	0	30	17	0	47
GARCIA SUBARU NORTH 401607	0	0	5	0	27	5	37
BERT OGDEN SUBARU	1	5	0	0	20	0	26
CORPUS CHRISTI SUBARU	21	4	0	0	0	0	25
CLEO BAY SUBARU	17	0	4	0	0	0	21
STERLING SUBARU	4	0	0	2	12	3	21
DOUGLASS SUBARU	0	0	6	6	4	0	16
PELTIER SUBARU	11	0	4	0	1	0	16
JUBILEE MITSUBISHI	6	3	4	0	0	0	13
JK SUBARU	5	3	0	0	3	0	11
HARVEY SUBARU	0	0	0	2	8	0	10
GARCIA SUBARU EAST 090507	10	0	0	0	0	0	10
BASIN SUBARU	8	0	0	0	0	0	8
WEST HOUSTON SUBARU	0	0	0	0	7	0	7
GARCIA SUBARU EL PASO	6	0	0	0	0	0	6
NORM REEVES SUBARU SUPERSTORE ROCKWALL	0	0	0	0	0	0	0
Sum	1,190	950	1,133	1,691	2,029	246	7,239

* The last allocation month available is 1/2021.

SOURCE: The Fontana Group, Inc.
DATA: Manufacturer Allocation Data File (Rates SOA000003).
FILE: MAUSSLP XLAXSSA 73 THRU 8

PROTESTANT'S EXHIBIT 511

Exhibit 151 demonstrates that the Baton Rouge Subaru dealership received **142 SSLP vehicles** – compared to **26 SSLP vehicles** received by Bert Ogden Subaru.

Joe Roesner discussed this critical fact:

> **Q: There's been testimony by expert witnesses on behalf of Subaru of America about making comparisons and case studies with Baton Rouge. Do you remember that, sir?**
>
> **A: Yes. Mr. Lytle - - Subaru of Baton Rouge was one of - - I think it was Mr. Lytle. It's possible that it was Mr. Farhat. But it was a case study that was presented, basically saying that here's the change of dealership (ownership) and here's the surge in sales that occurred.**

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Q: And that Subaru of Baton Rouge being compared to Bert Ogden Subaru, how much did the dealership receive in SSLP allocation?

A: Received a total of 142 units.

Q: Relative to other dealerships identified in Exhibit 511, how does Bert Ogden compare in terms of SSLP vehicles?

A: It would be, I'm going to approximate, the bottom third of this list."[39]

VII.
THE PFD FAILS TO CONSIDER DOCUMENTARY EVIDENCEFROM SOA CHRONICLING DEALERSHIP SUCCESS OF BERT OGDEN SUBARU BEFORE AND AFTER THE AUGUST 20, 2020 NOIT

Page 15 of the PFD sets forth an incomplete summary and/or analysis of vehicle inventory provided by SOA to Bert Ogden Subaru:

- **"Since the termination notice was issued, Bert Ogden increased its sales. For a few months, it was a significant increase. Beginning around August or September 2020, Bert Ogden's sales performance almost doubled in a 90-day period. Since that time, however, the rate has slowed down."**

The PFD ignored evidence regarding vehicles provided to Bert Ogden by SOA (both MAUI and SSLP). However, the PFD also ignored documented success of Bert Ogden – before and after the August 20, 2020 NOIT - which includes as follows:

Date:	**Exhibit #:**	**Accolade Made by SOA About Bert Ogden Subaru**
January 20, 2020	412	Today is the 2nd (10)-Day Close – 1/20/2020 Retail Sales Update "…..Bert Ogden is currently leading in pacing % of objective."
February 1, 2020	426	DFW District 3 January 2020 Month-End Recap "When looking at % over prior year, we had some monster performances but Sterling Subaru and Bert Ogden lead at 39% over prior year!"

[39] Hearing Record at page 2207, ll 6 to page 2208, ll 19.

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		Bert Ogden NPS Score: 100%
April 1, 2020	506	EOM District 3 Fixed Operations Recap Report – March 2020 As to FIRFT (Fix It Right the First Time): "The district averaged 94 and we had three (3) retailers with perfect scores of 100. Congratulations Bert Ogden Subaru, Superior Subaru and Hicks Family Subaru."
April 6, 2020	345	Re: District 3 Sales, SAS & Starlink Sales Close Updated 4/6/2020 "Bert Ogden Subaru takes the top % against objective spot with 33.3%!"
May 20, 2020	507	District 3 Hard Parts Business Plan – May 20, 2020 Update "Bert Ogden Subaru has gotten into the tire business and close to exceeding last year's May sales!"
May 29, 2020	346	Re: District 3 Sales & Trade Up Advantage "Bert Ogden Subaru takes the top spot for % against objective at 123.3%" • Hard Parts Business Projection vs. Objective 156.5%
June 2, 2020	347	District 3 May Results Recap "Congrats to Superior Subaru, Bert Ogden Subaru and Hicks Family Subaru!" • Bert Ogden Subaru was 140.0% as to the % Target Month to Date
June 8, 2020	348	District 3 Sales, SAS & Starlink Updated 6/8/2020 "Bert Ogden takes the top % against objective spot with 12.1%!"
July 24, 2020	444	Service OLP

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		"The District is led by Bert Ogden Subaru with a perfect NPS score of 100!"
August 10, 2020	349	District 3 Sales, SAS & Starlink Update 8/10/2020 "Bert Ogden takes the top % against objective spot with 22.5%!"
August 17, 2020	350	District 3 Sales, SAS & Starlink Updated "Bert Ogden Subaru takes the top % against objective spot with 47.5%!"
October 1, 2020	359	District 3 September Results Recap Bert Ogden Subaru is 103.3% of target
October 9, 2020	360	1st (10) Day Sales-Close Update (10/9/20) "Bert Ogden Subaru takes the top % against objective spot with 22.2%!"
October 12, 2020	361	District 3 Sales, SAS & Starlink Update (10/12/2020) "Bert Ogden Subaru takes the top % against objective spot with 50%!"
October 15, 2020	362	District 3 Sales & Trade Up Advantage Update (10/15/20) "Bert Ogden Subaru takes the top & against objective spot with 69.4%!"
October 16, 2020	363	Q4 OLP Rankings & Customer Corner Update: Bert Ogden NPS = 100.0% "JK, Superior, Sterling, Clear Lake, Hicks, Team Gillman North, North Park and Bert Ogden are all starting out the quarter on the right foot with a 100 NPS score right out of the gate."
October 30, 2020	364	District 3 Sales & Trade-Up Update (10/30/2020)

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		"Bert Ogden Subaru takes the top % against objective spot with 155.6%!"
November 2, 2020	365	District 3 Sales, Close, SAS & Starlink Update 11/1/2020 "Bert Ogden Subaru takes the top % against objective spot with 175%!"
November 3, 2020	366	District 3 October 2020 Results Recap: "Bert Ogden Subaru finishing at the top spot for % against objective with 186.1!%" "Congrats to Hicks Family Subaru & Bert Ogden Subaru for setting both their best Octobers ever and ALL-TIME best months ever!

The PFDs for prior TDMV termination cases are devoid of this type of record. Bert Ogden Subaru is a well-performing dealership whose efforts to grow this brand in this difficult market have been steady and effective. Evidence establishing this type of performance is wholly inconsistent with the "good cause" required for termination.

VIII.
THE PFD FAILS TO TAKE INTO CONSIDERATION THE DEMOGRAPHIC FACTORS OF THE PHARR AOR

SOA spends hundreds of thousands of dollars to have demographic data about its customers collected and analyzed. At trial the NVCS Reports for 2017, 2019 and 2022 were placed into evidence.[40] The NVCS Reports identify specific, distinctive and unique demographic characteristics shared by the Subaru purchasers. These demographic factors of a typical Subaru buyer are not the demographic factors of the Pharr AOR. This point was exhaustively made by Joe Roesner during the trial. The demographic factors of the Pharr AOR are not the demographic

[40] Exhibit 467 Appendix Pages 213 to 564.

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factors of the balance of the District and/or Zone to which Bert Ogden Subaru is assigned. This point was exhaustively made by Joe Roesner during trial.

As a result, the following provision from page 31 of the PFD is erroneous:

> **"They (Bert Ogden Subaru) did not, however, present persuasive evidence that it is significantly harder to sell Subarus in the Rio Grande Valley than in Corpus Christi, San Antonio or Bryan."**

Page 25 of Bert Ogden Subaru's Post-Trial Brief captures – in one chart – a sample of the evidence which demonstrates the distinct demographic differences between the Pharr AOR and the District and Zone:

	Bert Ogden AOR	**District Represented AORs – Less the Bert Ogden AOR;**	**Zone Represented AORs - Less the Bert Ogden AOR**
Hispanic or Latino[41]	**93.97%**	**43.48%**	**31.62%**
2021 Households By Ethnicity (Hispanic/Latino)[42]	**90.32%**	**35.76%**	**24.89%**
Median Age[43]	**30.33**	**35.22**	**35.91**
2021 Estimated Median All Owner-Occupied Housing Value[44]	**$92,815.80**	**$209,669.16**	**$214,266.14**
2021 Estimated Median Household Income[45]	**$39,927.30**	**$65,136.06**	**$65,197.10**
Less Than 9th Grade Education[46]	**20.10%**	**8.04%**	**6.39%**

[41] Exhibit 467, Tab (6), Page (2).
[42] Exhibit 467, Tab (6), Page (4).
[43] Exhibit 467, Tab (6), Page (3).
[44] Exhibit 467, Tab (6), Page (4).
[45] Exhibit 467, Tab (6), Page (6).
[46] Exhibit 467, Tab (6), Page (6).

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	Bert Ogden AOR	District Represented AORs – Less the Bert Ogden AOR;	Zone Represented AORs - Less the Bert Ogden AOR
Some High School No Diploma[47]	**13.31%**	**7.91%**	**7.41%**
Total Population Without High Sch. Diploma[48]	**33.41%**	**15.95%**	**13.8%**
Total Population with Bachelor's Degree or Higher[49]	**18.27%**	**31.08%**	**32.36%**

The evidence and chart outlined above demonstrate that the demographics for the Pharr AOR are vastly different from that of: a) the average Subaru buyer; b) the average buyer in the District and/or the c) the average buyer in the Zone. By SOA's own documents, the Pharr AOR is a more difficult location to market Subaru vehicles. To claim otherwise is to engage in wishful thinking – at best – or willful deception.

IX.
INJURY OR BENEFIT TO THE PUBLIC

The PFD does not come to terms with the absence of any reliable testimony about how long the RGV would be without a Subaru dealer if Bert Ogden Subaru is terminated. It simply accepts SOA's assurance that it will "quickly replace the dealership." That does not address whether RGV Subaru owners will be without a dealer for warranty work for weeks, months or close to a year.

[47] Exhibit 467, Tab (6), Page (6).
[48] Exhibit 467, Tab (6), Page (6).
[49] Exhibit 467, Tab (6), Page (6).

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The most reliable testimony on this subject came from Bert Ogden Subaru witness Natasha del Barrio, the executive head of Bert Ogden Group and its numerous dealerships. She has had real world experience in replacing a discontinued dealership with a new dealership franchised by the same line/make, and her testimony was that a replacement of this type can seldom be accomplished in less than six months and may take a year. During that time frame, Subaru owners in different parts of the Rio Grande Valley would be forced to drive about 140 extra miles to Corpus Christi or 240 extra miles to San Antonio for Subaru warranty or recall service, or to purchase a new Subaru. No SOA witness ventured an opinion as to how long the TDMV approval process would take if a new franchisee applied to replace Bert Ogden Subaru at some as yet unnamed location in the Rio Grande Valley.

In assessing harm to the public, the PFD makes the unwarranted assumption that the Bert Ogden Subaru customer satisfaction scores of "outstanding" or close to outstanding are "low" because other dealers have higher scores. The PFD even utilizes the term "poor service" on pp. 53-54. This misrepresents the evidence. Every OLP survey from a Bert Ogden Subaru customer had the option to rate the dealer as "poor", "extraordinary", or another rating. Typically, a very low percentage, 2 to 4%, rated the dealership as "poor." It is grossly unfair and contrary to the evidence for the PFD to use the term "poor" to rate Bert Ogden Subaru sales or service when only one in 25 to 50 customers who rated Bert Ogden Subaru actually stated such an opinion when given the chance to do so, and most customer rated the dealer as "extraordinary."

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X.
CONCLUSION

The grounds cited in this PFD for "good cause" for termination bears no resemblance to TDMV precedent for dealer termination. Based on many decades of termination cases - both those in which termination was approved and those in which it was denied - Bert Ogden Subaru is not the type of dealer for which termination is appropriate. Furthermore, most of the grounds for termination relied on in the PFD were not found in the manufacturer's Notice of Intent to Terminate. The PFD simply disregards the statutory requirement that the manufacturer provide the dealer a notice of termination disclosing the "specific grounds" for termination.

The PFD correctly found that SOA's assertion in the Notice of Intent to Terminate ("NOIT") that Bert Ogden Subaru's OLP scores were a breach of the franchise agreement was without merit. Having disposed of this claim, there is no dispute that the only "specific grounds" remaining in the NOIT were based on Subaru of America's desire to sell more cars – to increase market penetration.

The PFD ignores not only the statutorily required notice, but casually dismisses the statutory prohibition of termination based on a manufacturer's desire for greater market penetration. Not only does the PFD rely on many grounds for termination first raised at the hearing, for which the NOIT provided no notice, it also relies upon manufacturer policies that exist nowhere in writing and on complaints for which the dealer never received notice and opportunity to cure, as required by the franchise agreement.

The Occupation Code's provisions for dealer termination were created by the legislature to protect a dealer who has invested money, time and energy in a franchised dealership, while balancing a manufacturer's need to terminate failing and unethical dealers. The record shows that Bert Ogden Subaru is not the type of dealership for which the termination provisions were

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intended. Termination of Bert Ogden Subaru based on the record this termination proceeding would deprive this and other dealerships in Texas of the statutory balance and protection required by the Texas Occupations Code. It would effectively put manufacturers in a position to terminate any dealer whose sales performance, under the manufacturer's preferred metric, was lower than those of other manufacturers - regardless of actual market demand and other relevant conditions in the dealer's area of responsibility.

The record in this case shows that Bert Ogden Subaru's sales in its market were far superior to sales achieved by the eight Subaru dealers who preceded in in that market. During a five-year period that preceded the hearing in this case, its sales were steadily growing as its investment in the Subaru brand began to take effect. The PFD ignores this evidence of steady sales growth and relies on a flawed metric, MSR, which this agency and the courts have repeatedly criticized as for failing to deal with the market reality of local brand preferences. The PFD also failed to address the credible expert testimony that SOA's reliance on "segmentation" confirms the unreliability of MSR as a metric and it wholly fails to predict actual performance of any particular make and model either in the Pharr AOR or anywhere else that Subaru sells cars in the DFW Zone.

Bert Ogden Subaru's consistently increasing sales performance over the years prior to and subsequent to SOA's NOIT is not a recent development triggered by receipt of the NOIT. It is the result of more than a decade of work by a respected and successful Rio Grande Valley dealer to build a little known and unpopular brand - which SOA had shuffled without success for decades from dealer to dealer.

It is true that sales of Subarus in the Rio Grande Valley have not kept pace with the rapidly growing numbers of new vehicles Bert Ogden Group has sold for other manufacturers. However, the PFD's conclusion that this gap was based on a perceived lack of commitment by Bert Ogden

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Subaru is not supported by the evidence. This dealer sold every vehicle SOA gave it to sell. The evidence establishes that the other manufacturers did what SOA did not or would not do - they supplied Bert Ogden dealerships with enough inventory to be successful. As Mr. Vackar, the Bert Ogden Subaru dealer principal put it to SOA many years ago, "it's hard to sell wares out of an empty wagon."

The record of Bert Ogden Subaru is not like that of any dealer for which TDMV has approved the harsh remedy of termination. The PFD erroneously concludes that this dealer should lose its thirteen-year investment in time, energy and money building the Subaru brand in a uniquely difficult market because this manufacturer wants to gamble on a tenth dealer in the Rio Grande Valley. SOA should not be permitted to terminate a demonstrably capable dealer after refusing to provide that dealer the same level of inventory that made its affiliate dealerships successful in 22 other Rio Grande Valley franchises.

The PFD fails to deal with reliable and probative evidence[50] of Bert Ogden's satisfactory and improving performance, as outlined in **Attachment B** to these Exceptions. Far from imposing the burden of proof on the manufacturer as required in a termination proceeding, the PFD ignores much of the probative evidence and testimony offered by Bert Ogden Subaru.

Bert Ogden Subaru is not the type of dealer for which termination has been approved in Texas. Given the PFD's reliance on SOA allegations not named in the NOIT and not identified in any notice and opportunity to cure, it effectively validates trial by ambush. This calls for a complete re-evaluation of the PFD.

[50] **Attachment B** is a table outlining the evidence offered by Bert Ogden Subaru which is ignored by the PFD.

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This dealer has a solid and compliant floor plan, modern and well-designed facilities, a history of "extraordinary" customer service ("OLP") scores, more than five years of steady sales growth and substantial investment. The PFD should be revised to deny the remedy of termination and to uphold the dealer's protest.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on August 3, 2022, a true and correct copy of the foregoing ***"McAllen Jeep, Inc.'s d/b/a Bert Ogden Subaru's Exceptions to the Proposal for Decision"*** was served via email and certified mail, return receipt requested to the following:

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8/3/2022 7:05:52 pm
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ADMINISTRATIVE HEARINGS
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"ATTACHMENT A" TO EXCEPTIONS

MCALLEN JEEP, INC. D/B/A BERT OGDEN SUBARU'S OBJECTIONS TO TO THE FINDINGS OF FACT WITHIN THE PROPOSAL FOR DECISION

Complainant McAllen Jeep, Inc. d/b/a Bert Ogden Subaru ("Bert Ogden Subaru") asserts the following objections to the Findings of Fact within The Proposal for Decision ("FF") issued on July 19, 2022, which recommends the termination of Bert Ogden Subaru's franchise by Subaru of America, Inc. ("SOA").

I.

Failure to Include as a "Specific Ground" in the Notice of Intention to Terminate

Texas Occupations Code §2301.453 (c) required that SOA, like any other manufacturer, provide "written notice" "stating the specific grounds for the termination." The record shows that the NOIT sent to Bert Ogden Subaru by SOA set forth only **three** grounds for termination. These grounds were the alleged failure of Bert Ogden Subaru to achieve 100% MSR, the alleged failure of Bert Ogden Subaru to achieve the sales called for in the 2017 Sales Performance Agreement and a claim that the **comparative** ranking of the Bert Ogden Subaru OLP Scores were a breach of sections 4.1 and 4.2 of the Dealer Agreement.

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Within its findings of fact and conclusions of law, the PFD includes the following proposed finding of facts based on matters that were not identified in the NOIT as a "specific ground" for the termination:

FF 15, FF 16, FF 56, FF 69, FF 71, FF 72, FF 73, FF 74, FF 75, FF 76, FF 77, FF 78, FF 79, FF 80, and FF 88.

II.

SOA's Failure to Give Notice and an Opportunity to Cure

Section 17.1 of the Dealer Agreement states s:

"In such event of 17.1.24 (a) through 17.1.24 (l), Distributor will notify Dealer of any such failure and will review with Dealer the nature and extent of such failure and the reasons which, in Distributor's opinion, account for such failure. Thereafter, Distributor will provide Dealer with a reasonable opportunity to correct the failure. If Dealer fails to make substantial progress toward remedying such failure before the expiration of such period, Distributor may terminate the agreement." (emphasis added)

Section 17.1.24 reads:

"Failure by Dealer to substantially fulfill, based upon evaluations by Distributor, its responsibilities, including but not limited to, the following:

(a) Sale of Subaru Products; or

(b) Maintenance of the Facilities and the approved location; or

(c) Service of Subaru Products; or

(d) Submission of accurate reports and other information as required under the Agreement or as may be reasonably requested by Distributor; or

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(e) Permitting Distributor SOA to make an examination or audit of Dealer's accounts and records concerning Dealer's business, after receipt of notice from Distributor or SOA requesting such examination or audit; or

(f) Payment for Subaru Products or any other products or services purchased y Dealer from Distributor; or

(g) Maintenance of net worth, net cash and net working capital in accordance with guidelines; or

(h) Fulfillment of Dealer of Dealer's warranties or obligations; or

(i) Dealer's performance under the Agreement, whether or not expressly identified herein as material in nature.

Within the findings of fact the PFD includes numerous proposed facts which relate to claimed breaches of the Dealer Agreement for which there was no notice, no reasonable opportunity to cure or which Bert Ogden Subaru made substantial progress toward remedying. These proposed findings of fact include:

FF 71, FF 72, FF 73, FF 74, FF 75, FF 76, FF 77, FF 78, FF 79, FF 80, FF 85, FF 86, FF 87, and FF 88.

III.

The Proposed Findings of Fact Misstate the Record

The PFDs misstates the record with regard to many of the proposed findings of fact. These factually inaccurate proposed findings of fact include:

FF 15, FF 25, FF 27, FF 28, FF 38, FF 39, FF 40, FF 41, FF 43, FF 44, FF 47, FF 49, FF 50, FF 51, FF 52, FF 56, FF 58, FF 60, FF 65, FF 66, FF 70, FF 71, FF 72, FF 73, FF 74, FF 75, FF 76, FF 77, FF 78, FF 79, FF 80, FF 86, FF 87, FF 88, FF 90, and FF 93.

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IV.

Specific Objections

FF 25 – 40.

OBJECTION:

Bert Ogden Subaru objects to numbers 25 - 40 of the Proposed Findings of Fact on the basis that they are vague, misstate the evidence and are not relevant to the issue of "good cause" for termination under the Occupations Code The phrase “sales goals” is “undefined” and assumes that the statutory criteria “sales in relation to the market” is limited to a comparison of the affected dealer's sales with sales of other dealers in a Subaru of America defined area for some narrow (and also undefined time period). There is no dispute that Bert Ogden Subaru sold far more vehicle within its market areas, using any metric or standard of comparison, than any of the eight prior franchised Subaru dealers selling in the same market prior to the time Bert Ogden Subaru became the Subaru new car franchisee. Furthermore, SOA’s termination of this dealer based on use of an arbitrary and capricious metric- “MSR” - is not supported by the law or the facts, given that SOA acknowledged to Bert Ogden Subaru that achieving MSR was "a long term goal" and not a standard for which compliance was required or expected by SOA

FF 41, 43, 44, 47, 49, 51 and 52.

OBJECTION:

Bert Ogden Subaru objects to FF 41, 43, 44, 47, 49, 51 and 52 in that they misstate the record. The record shows that SOA allocates vehicles not only upon its calculation of days of supply, but also through the discretionary distribution of Market Action Unit s (“MAUI.) vehicles. SOA’s manipulation of the distribution of MAUI units and especially MAUI units which it categorizes as “SSLP” units greatly impacts the manner and quantity of vehicles allocated to

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individual dealerships.

FF 50.

OBJECTION:

Bert Ogden Subaru objects to FF 50 in that it misstates the record. The evidence is that SOA allocated the greatest number of SSLP MAUI units to Bert Ogden Subaru in the history of its dealership at or near the time of the Notice of Intent to Terminate, which allocation allowed it to generate the greatest "earn" of vehicles in the history of its dealership and thus allowing it to sell the highest number of number of units per month in the dealership history, so long as the increased discretionary inventory was provided.

FF 56

OBJECTION:

Bert Ogden Subaru objects to FF 56 in that it misstates the record. The evidence is unchallenged that the dealer principal invested substantial sums into the Subaru dealership and that these investments will be lost if the franchise is terminated. That the investments were made in a manner coming from the Group rather than a single stand alone dealership does not remove the actual loss of investment caused by the termination. There is nothing in the law that permits this unreasonable application of the Good Cause Factors.

FF 60

OBJECTION:

Bert Ogden Subaru objects to FF 60 in that it misstates the record. The PFD relies on e the comparative ranking of Bert Ogden Subaru's OLP scores as a basis for termination and disregards the objectively more reliable actual ratings by customers that its sales and service performance was "extraordinary." Where the evidence in the record contains an unambiguous factual

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determination that customers rated a dealership as "extraordinary," it is against the great weight and preponderance of the evidence to rely on the less reliable metric of "comparative" OLP scores as good cause for termination.

FF 61 and 65-67

OBJECTION:

Bert Ogden Subaru objects to FF 61 and 65- 67 in that they are not relevant to the issue of good cause for termination and misstate the record. There is no SOA policy or contractual term which calls for the comparison of one dealership's OLP scores to those of other dealers. There is no evidence that the use of OLP scores from one cohort in one AOR can reliably be used as a comparative tool against OLP scores from a different cohort in a different AOR for a different dealership. The undisputed evidence is that Bert Ogden Subaru's customers rated it as Extraordinary in both "purchase" and "service." These proposed finding of fact wrongly seek to base the termination of a dealership for not being "Extraordinary" enough.

FF 70-80

OBJECTION:

Bert Ogden Subaru objects to FF 70 - 80 in that they are not relevant and misstate the record. The record shows that from 2019-2021, Bert Ogden Subaru had the number of exclusive employees required by SOA. This evidence was disregarded and ignored. Furthermore, none of these findings of fact relate to any specific complaint raised by SOA in the Notice of Intent to Terminate. Furthermore, the use of the comparison based on "VIO" (vehicles in operation) is not supported by the evidence and is not a requirement of the franchise agreement or any SOA policy. Furthermore, the ALJs' use of the phrase "Bert Ogden reported." does not reflect the actual evidence on these issues introduced at the hearing and misstates the record.

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FF 86-87

OBJECTION:

Bert Ogden Subaru objects to FF 86 and 87 in that they misstate the record. The evidence establishes and is admitted by SOA that even if Bert Ogden Subaru had "turned" vehicles at the Zone rate, SOA did not allocate it sufficient inventory to comply with SOA's unilaterally imposed sales performance agreement.

FF 88

OBJECTION:

Bert Ogden Subaru objects to FF 88 in that it is not relevant to the issue of good cause for termination and misstates the record. The evidence is that from 2019-2021, Bert Ogden Subaru had the number of exclusive employees required by SOA. This evidence was disregarded and ignored. Furthermore, none of these findings of fact relate to any specific grounds asserted by SOA in the Notice of Intent to Terminate.

FF 90

OBJECTION:

Bert Ogden Subaru objects to FF 90 for the reasons and grounds set out to FF 86-89 above.

FF 91 and 93

OBJECTION:

Bert Ogden Subaru objects to FF 91 and 93 in that they misstate the record and are not supported by the evidence. The evidence establishes, and is admitted by SOA, that Bert Ogden Subaru was not permitted to negotiate or modify the terms of either its franchise agreement or the Sales Performance Agreement which SOA cites as grounds for termination. They were a "take it or leave it" agreements for which the parties did not have comparable bargaining power and which

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were effectively contracts of adhesion. That these non-negotiable terms were changed and new terms were imposed after Bert Ogden Subaru had made its investment in the dealership establishes the lack of enforceability of for reasons of public policy. s. The grounds for termination asserted by SOA in the NOIT generally confirm that this termination is based on SOA's r desire for greater market penetration. That inclusion in the NOITs of the assertion that Bert Ogden Subaru's "Extraordinary OLP" score amounted to a breach of the contract does not obviate the two other grounds relied on- MSR scores and the Sales Performance Agreement, both of which are based on market penetration metrics.

IV. Conclusion

For the reasons set forth above, the cited Findings of Fact set out in the Proposal for Decision should be revised or disregarded.

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"ATTACHMENT B" TO EXCEPTIONS

EVIDENCE IGNORED

A. Sales in Relation to the Market

MSR is not an appropriate metric to calculate the sales of Bert Ogden Subaru in relation to sales in the Market.

1. Casey Griffin, the SOA employee charged with the responsibility to sign and serve the NOIT, admits that Bert Ogden Subaru was not required to achieve MSR for the years 2017 through 2020, while the addendum was in place. See Hearing Record at page 733, 1-12; page 716, ll 16-19.

2. SOA likewise concedes that it had represented MSR to Bert Ogden Subaru as a "long-term goal" and that SOA was not expecting Bert Ogden Subaru to meet the MSR SOA assigned to it. See Hearing Record at Page 716, ll 16-19; Hearing Record at Page 736, ll 15-18; Hearing Record at page 479, l 21 to page 480, l 1.; See also Hearing Record at page 981, ll 7-18; page 1926, ll 1- 25; page 1927, ll 1-7; Exhibit 321.

3. Bert Ogden Subaru's actual aggregate sales increased over 50% between 2017 and 2021. See Exhibit 172 (sales for year end 2017-2019); Exhibit 63 (sales for year end 2020) and Hearing Record at page 1866, ll 7-9 (sales for year end 2021); Exhibit 489.

4. SOA's computation of MSR ignores the brand preferences and demographic differences existing in this market area as compared to the other market areas within the DFW Zone. See Hearing Exhibit 467 at tab 9, page 5; Hearing Exhibit 467 at tab 6, pages 2, 3 and 6; Exhibit 467, Tab (6), Page (2); Exhibit 467, Tab (6), Page (4); Exhibit 467, Tab (6), Page (3); Exhibit 467, Tab (6), Page (6).

5. Joe Roesner looked at Exhibit 188 (a chart/graph utilized by SOA Expert, Sharif Farhat) and explained that "if MSR was truly picking up **all variations** (emphasis added) outside of a dealer's control in its calculations" then you would expect to see one or more dealers exactly on the light blue line in Exhibit 188 entitled, "MSR. See Hearing Record at page 2224, ll 13 to page 2225, ll 5.

6. The regression analysis prepared by SOA's expert, Sharif Farhat, which he did not manipulate (by forcing the y intercept to zero) clearly demonstrates that over 46% of dealerships sales are correlated to a factor other than MSR. See Exhibit 189-002.

7. Mr. Roesner notes that Exhibit 188 identifies a number of dealerships "that are well above and a number that are well below." Hearing Record at page 2225, ll 2-5.

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8. Because of the nature of this data in Exhibit 188, Joe Roesner explained that "other factors than just MSR are driving sales." See Hearing Record at page 2225, ll 4-5.

9. According to Mr. Roesner, if the Subaru market segmentation genuinely adjusted for demographic factors and other market variations, it would be common for the SOSA Reports in most AORs to resemble the DFW Zone allocation used to set the "Benchmark". In fact, sales in many AORs, including the Pharr AOR, vary wildly from the DFW Zone Benchmark. See Hearing Record at page 2256,ll 6 to page 2258, ll 21.

10. MSR is a flawed metric: Mr. Roesner addressed the fallacy of segmentation, explaining as follows: "And basically the MSR and segmentation is saying that the probability is exactly the same that somebody anywhere in the district or the zone, depending upon the benchmark being used, will buy an Outback as they will a comparable General Motors offering. And that's just not the case." See Hearing Record at Page 2274, ll 21 to page 2275, ll 1.

11. In his initial business plan, Mr. Vackar informed SOA of the inventory levels required to repeat the success he had achieved in his other franchises. At that point, SOA could have declined his application, or made it clear that it would not honor the inventory levels he set out as a critical component of his business plan. Instead after the application was approved and a substantial start up investment was made, SOA told Mr. Vackar for the first time that a natural disaster and year end issues precluded the supply of the level of inventory he had specifically set out as a component of success. See Exhibit 310; See also Hearing Record at page 2037, ll 20-25; page 2038, ll 1-21; page 2054, ll 3-25; page 2055 at ll 1-13; Exhibit 322; Also see Hearing Record at page 2069, 11 17-25; page 2070, ll 1-14.

12. Bert Ogden Subaru was never provided with a sufficient inventory to achieve MSR. See Hearing Exhibit 172 for data related to years 2017-2019; Exhibit 63 for 2020 information; Exhibit 141; Exhibit 172.

13. SOA was aware of these numbers and the lack of inventory to meet MSR requirements, and admitted that "you need inventory to sell vehicles." See Hearing Record at page 974, ll 18-25.

14. The number of cars that SOA provided to Bert Ogden Subaru simply was never sufficient to enable it to meet its MSR. See Exhibit 321; Exhibit 172; Hearing Record at page 477, ll 3-18.

15. Bert Ogden made numerous requests for additional inventory so that it could increase its MSR percentage and its overall sales and its requests were largely ignored. See Hearing Record at page 243, ll 16-19; Exhibits 310, 325, 435, 408, 409, 356, and 410.

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16. SOA's Zone Manager Dave Adams falsely testified at this hearing that SOA had provided Bert Ogden Subaru "…by far the most…." MAUI units in the DFW Zone to assist Bert Ogden Subaru to help it meet MSR. See Hearing Record at page 404, ll 13-20.

17. The SOA report which details allocation of discretionary units confirms that other dealers in the DFW Zone received far more than Bert Ogden Subaru. See Exhibit 191.1 and Exhibit 510.

18. According to Mr. Adams, even if Bert Ogden Subaru were to sell cars at the DFW Zone "sales efficiency" rate deemed acceptable by SOA, it could not comply with the sales requirements for the period July 1-2018 – June 30, 2020. See Exhibit 172; Exhibit 332.

19. During the time period covered by evidence admitted in this case, SOA never provided Bert Ogden Subaru with as many as 100 units at one time. The 61 units provided to Bert Ogden Subaru by SOA in November 2020 was the largest monthly allocation ever, by a factor of at least ten units. See Exhibit 141; Hearing Record at page 640 ll 17-25; page 641 ll 1; page 1790 ll 4-25; page 1791 ll 1-5; Exhibit 467 Paragraph 40-Tab 28; Exhibit 484 Paragraph 15-Tab 10.

20. The impact of SOA's historical failure to provide sufficient inventory is illustrated by the allocation made by SOA and the sales performance of Bert Ogden Subaru in the last quarter of 2020. When SOA finally provided a substantial number of discretionary cars in October and November 2020, Bert Ogden Subaru achieved record high sales. See Exhibit 141 and 142.

21. The manner in which Bert Ogden Subaru's sales record should be measured in this market is its continuous and steady sales growth over the past five years. See page 17 of the Post Reply Brief.

22. Bert Ogden Subaru, whose geographic isolation is compounded by its proximity to Mexico on one side (where it cannot sell Subarus), to an ocean (the Gulf of Mexico) on another, and to a thinly populated desert for a couple of hundred miles to the North. These geographic and demographic facts place Bert Ogden Subaru in one of the most unfavorable locations imaginable for capturing Subaru sales outside of a dealer's AOR. See Id.

23. It is not possible to compare sales by Bert Ogden Subaru and other dealers in the same AOR or general geographic area, because there are none. See Id.

24. The fact that Bert Ogden Subaru is the ninth SOA dealership in its market area and that has been far more successful than all predecessors provides the most meaningful comparison for Bert Ogden Subaru's "sales relative to sales in the market." See Id.

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25. The Rio Grande Valley is the relevant "market" and other than the eight previous Subaru dealers there are no other dealers in this market to whom Bert Ogden Subaru may be fairly compared. See Id.

26. During the last five years, actual vehicle sales by Bert Ogden Subaru have increased each year and its MSR scores have increased by a factor of over 30%. See Id.

27. SOA's ignored the argument that Bert Ogden Subaru has made from the first day of the hearing in this case- that MSR was not an appropriate sales performance metric for this dealer and this market area, and that a more appropriate sales performance metric would be the steady and substantial growth in numbers of cars sold and overall sales over the five year period before the hearing. Bert Ogden Subaru continues to tender that metric as more appropriate for statutory factor one, this dealer's sales relative to sales in its market. See page 60-61 of Bert Ogden Subaru's Reply Brief.

C. Injury or Benefit to the Public

Bert Ogden Subaru's "extraordinary OLP scores" do no reflect "poor" or "substandard service."

1. SOA's scale for OLP scores go from 0 to 1000, with a score of 751 - 1000 being closest to the "extraordinary" scoring anchor. Under this SOA created scoring system, Bert Ogden Subaru's sales and service customers rated it closer to "extraordinary" than to "very good" for every year from 2016 through 2021. See Exhibit 43; Hearing Record at page 192, ll16-25; page 193, ll1-24; page 468, ll 5-20.

2. SOA's claim that a comparative ranking involving overall satisfaction scores by different buyers in different markets means that one dealer has provided "poor" service has no basis in reality. SOA offered no rationale that a comparative ranking alone establishes that one dealer's service was "poor", especially when only about 2% of customers score that dealer as "poor" and the dealer's consensus score is "extraordinary." See page 71 of Bert Ogden Subaru's Reply Brief.

3. Comparative ranking, is a concept that is never mentioned in the dealer agreement or any of the voluminous SOA documents that explain the OLP program to dealers. See page 71 of Bert Ogden Subaru's Reply Brief.

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4. Instead of recognizing the "outstanding" or “extraordinary” customer satisfaction ratings Bert Ogden Subaru consistently achieved (using SOA's own metric and scoring system), SOA relies on a highly curated compilation of anonymous customer verbatims deemed adverse to Bert Ogden Subaru. SOA **admits** its compilation of customer comments was structured to exclude and ignore every positive customer review and statement. See Hearing Record at page 189, ll 23-25 and page 190, ll 1-4.

5. SOA’s compilation of anecdotal anonymous and selected customer comments is not reliable evidence. See page 72 of Bert Ogden Subaru’s Reply Brief.

6. In deciding to terminate Bert Ogden Subaru, SOA **ignored** the consensus "extraordinary" customer sales and service satisfaction scores and instead focused entirely on how Bert Ogden Subaru's OLP scores compare to those of other dealers. Nothing in the SOA franchise agreements at issue in this case and nothing in Texas law supports the notion that a manufacturer may terminate a dealer because that dealer scores lower than other dealers in customer satisfaction surveys- especially when the dealer targeted for termination is consistently rated closest to "extraordinary." See page 3 of Bert Ogden Subaru’s Closing Statement.

7. It is undisputed that there is no requirement for Bert Ogden Subaru to achieve any numerical or relative OLP ranking within the Zone, either in paragraph 4 (the paragraph cited in the NOIT) or anywhere else in the franchise agreement. See Exhibit 11; Note that SOA witnesses admitted that the Bert Ogden Subaru OLP score for the relevant time periods was closer to “Extraordinary” than” Very Good.” See Hearing Record at page 192, ll16-25, page 193, ll1-24; and that there is no OLP ranking provision within the franchise agreement. Hearing Exhibit at Page 291, ll 13-17 and Page 292, ll 4-12.

8. As admitted by SOA, some dealer will always rank behind SOA's other dealers, and will therefore be out of the game, even with these “extraordinary” ratings. See page 3 of Bert Ogden Subaru’s Closing Statement.

9. Until the end of 2021, SOA measured overall satisfaction of customers through two survey questions, one for service customers and one for sales customers. See Hearing Record at page 758 ll 7-18; page 827 ll 11-25; page 828 ll 1; page 829 ll 16-23.

10. The "overall satisfaction" question was the only question used and the sole basis in calculating the customer satisfaction score from 2016 until the end of 2021. See Hearing Record at page 830 ll 22-25; page 831 ll 1-25; page 832 ll 1.

11. The single “overall satisfaction score" SOA had relied on as the sole basis for purchase and service OLP scores was eliminated on December 31, 2021. After December 31, 2021, no Subaru customer will be asked the overall satisfaction question and it will not be scored, relied on, or reported to dealers. Hearing Record at page 772 ll 1-17; page 827 ll 11-25; page 828 ll 1-25; page 829 ll 1-10.

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12. SOA's contention that Bert Ogden Subaru's OLP scores amount to a breach of the franchise or otherwise support a finding of "good cause" for termination is contradicted by the evidence. SOA offered no evidence that a dealer's relative OLP ranking among dealers in the DFW Zone affects future purchases by Subaru owners and has admitted that it has never completed a study to answer the question. Given that Bert Ogden Subaru earned OLP sales and service scores in the "extraordinary" range (the highest rating possible) no logical inference can be drawn that its customers would not return for future sales and service needs. See page 5 of Bert Ogden Subaru's Closing Statement.

13. The **relative** ranking of a dealer who consistently receives "extraordinary" OLP scores from customers is not evidence of non-compliance with the franchise agreement. See page 16 of Bert Ogden Subaru's Reply Brief.

14. SOA offered no rationale that a comparative ranking alone establishes that one dealer's service was "poor", especially when only about 2% of customers score that dealer as "poor" and the dealer's consensus score is "extraordinary." See page 71 of Bert Ogden Subaru's Reply Brief.

15. The **undisputed evidence** about SOA's OLP Program established the following:
    - The single question format of the SOA OLP survey was drafted and approved by SOA. See Hearing Record at page 758 ll 7-18; page 827 ll 11-25; page 828 ll 1; page 829 ll 16-23.
    - SOA was responsible for conducting the OLP surveys. See Hearing Record at page 758, l19 through page 759, ll 9.
    - SOA was responsible for assigning the OLP scoring system and the scoring anchors. See Exhibit 328.
    - Bert Ogden Subaru received a purchase OLP score closer to "extraordinary" than "very good" every year from 2017-2021. See Exhibit 43 and Hearing Record at page 192, l116-25; page 193, ll1-24; page 468, ll 5-20.
    - Bert Ogden Subaru received a service OLP score closer to "extraordinary" than "very good" every year from 2017-2021. See Id.
    - SOA abandoned the use of the single "overall satisfaction" question score as the sole OLP score performance metric about two weeks before the Hearing. See Hearing record at page 180, ll9 – 16. Exhibit 380.

16. On the other hand, there is **no evidence** that:
    - The SOA drafted Franchise Agreement required any specific OLP purchase score. See Exhibit 11.
    - The SOA drafted Franchise Agreement required any specific OLP service score. See Id.
    - The SOA drafted Franchise Agreement required any comparative ranking for OLP purchase score. See Id.
    - The SOA drafted Franchise Agreement required any comparative ranking for OLP service score. See Id.

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- That SOA ever received any OLP annual score for either purchase or service other than a score closer to "extraordinary" than "very good" during its term as a SOA franchised dealer.

17. In its opening statement, SOA limited its argument to its speculative belief that a new dealer would sell more cars and employ more employees. See Hearing Record at page 21, ll 11-25; page 22, ll 1-23.

18. SOA concedes that it does know what length of time it would take the TDMC to approve a new franchise and award a new point. See Hearing Record at page 417, ll 12-25; page 418, ll 1-9; Hearing Record at page 255, ll 1-25.

19. The Bert Ogden Group, which currently has more than 20 dealerships in the Rio Grande Valley, has opened several new franchises during the tenure of the current CEO. The quickest time for the process was a few months, other new franchises took six months or more, and some took up to one year. See Hearing Record at page 1945, ll 2-13.

20. If TDMV approves a new Subaru franchise for the Rio Grande Valley, a new dealer will need to find a dealership location with both sales and service facilities, obtain parts, obtain vehicles, and train new employees in Subaru's special mechanical features. See Hearing Record at page 254, ll 13-20; page 1945, ll 2-13.

21. During the time these processes play out, existing Subaru owners would need to take their vehicles to the closest existing Subaru dealerships, Corpus Christi or San Antonio, for service. See Hearing Record at page 1944, ll 16-25.

22. The distance from points in the Rio Grande Valley to of these locations can vary from 180-240 miles depending on where the Subaru owners reside. See Hearing Record at page 1696, ll 13-19.

D. Adequacy of Service Facilities, Equipment, Parts, and Personnel in Relation to Other Dealers

There is little evidence comparing Bert Ogden Subaru to other dealers.

1. The NOIT does not raise any issue or claim with the adequacy of the dealer's equipment or parts nor does it identify it as a specific ground for termination. Casey Griffin testified that the NOIT did not contain any reference to the adequacy of the dealer's equipment or parts. See See Exhibit 172; Hearing Record at page 741, ll 4-15.

2. SOA never sent Bert Ogden Subaru a cure letter mentioning warranty service, the adequacy of dealer's service facilities, equipment or parts, or the adequacy of the dealer's investments. See Hearing Record at page 745 ll 4-7.

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3. The evidence established that, at least for 2019 through the present, the number of certified/exclusive employees met or exceeded SOA's requirements. See Exhibits 15-19; Hearing Record at page 1686, l 1 through page 1694, ll 6.

4. Hector Flores offered conclusory testimony on the sufficiency and the number of employees at Bert Ogden Subaru, but he did not offer facts on to the adequacy of Bert Ogden Subaru's service personnel as compared to other Subaru dealers. See Hearing record at page 1013, l 24 through page 1014, l 4.

5. The evidence from the MSOG reports relied on by SOA is that Bert Ogden Subaru employed certified parts and service employees from at least the period 2016 - 2021. See Exhibit 15-003 – 19-003 shows that Bert Ogden Subaru had certified parts and service employees (P11, P13, P14, P15).

6. Geoff Mauldin testified that, as it related to the requirement for exclusivity, (at least from 2019 – present), Bert Ogden Subaru had the required exclusive service employees. See Hearing Record at Page 1685, l 23 to Page 1701, l 17.

7. Bert Ogden Subaru also had the contractually required number of certified parts and service employees from 2017 through 2021. See Exhibits 15-19 and Hearing Record at Page 1685, l 23 to Page 1701, l 17.

8. Hearing Exhibits 489, 172, and the record at P. 1866, confirms that Bert Ogden Subaru's "number of vehicles sold" increased every year from 2017 to 2021, going from 325 in 2017 to 500 in 2021. Total sales (which includes parts and service) during the period 2017 through 2020 (2021 data not available at time of hearing) rose from $13.9 million to $22.1 million, the last year reflecting a one-year increase of 35%.

9. SOA offered no credible and persuasive evidence comparing the Bert Ogden Subaru facilities, equipment, parts, and personnel in relation to those of other dealers of new motor vehicles of the same line-make. SOA's evidence about the level of parts inventory at Bert Ogden Subaru showed only that it varied over time in comparison to parts inventory of other Subaru dealers, but SOA offered no evidence that any customer was delayed or otherwise harmed at any time from lack of inventory at Bert Ogden Subaru. SOA's evidence about the reported value of equipment at Bert Ogden Subaru failed to take into account whether the value of that equipment had been amortized for accounting purposes. SOA offered no evidence that any Bert Ogden Subaru customer was delayed or harmed in any way due to a lack of equipment at Bert Ogden Subaru. See TOC§2301.455 (4).

10. Bert Ogden Subaru's facilities, equipment, and parts complied with the SOA requirements at all times relevant to the 2017 Franchise Agreement. See Exhibit 15; Exhibit 16; Exhibit 17 and Exhibit 18.

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11. Bert Ogden Subaru's personnel and staffing complied with the SOA requirements at all times from 2019 through the date of the NOIT. See Exhibit 17, Exhibit 18, and Exhibit 19; Hearing Record at page 1685, ll 23-25; page 1686, ll 1-25; page 1687, ll 1-25; page 1988, ll 1-25; page 1689, ll 1-15; page 1690, ll 1-25; page 1691, ll 1-9; at page 1691, ll 10-25; page 1692, ll 1-25; page 1693, ll 1-25; page 1694, l 1.

12. Mr. Dubinsky, the individual who currently is and has been ultimately responsible for the SOA OLP program since its inception, could not state whether OLP scores that are closer to "extraordinary" than "very good" would be a basis for SOA to terminate a dealer. See Hearing Record at page 754 ll 9-11; page 755 ll 25; page 756 ll 1-4; page 823 ll 17-24.

13. Mr. Dubinsky agrees that neither SOA Ex. 25, the Understanding the Retailer Report, nor SOA Exhibit 26, the Navigation Guide, sets minimum acceptable percentiles for OLP scores. See Hearing Record at page 823 ll 1-6.

14. SOA's own metric for adequacy of customer service- Service OLP- Bert Ogden Subaru customers rated it as "Extraordinary" every year from 2017 through 2020. See Exhibit 43; Hearing Record at page 192, ll 16-25; page 193, ll 1-24; and page 468, ll 5-20.

F. Compliance with the Franchise

1. Casey Griffin, the SOA employee charged with the responsibility to sign and serve the NOIT, admits that Bert Ogden Subaru was not required to achieve MSR for the years 2017 through 2020, while the addendum was in place. See Hearing Record at page 733, 1-12; page 716, ll 16-19.

2. SOA likewise concedes that it had represented MSR to Bert Ogden Subaru as a "long-term goal" and that SOA was not expecting Bert Ogden Subaru to meet the MSR SOA assigned to it. See Hearing Record at Page 716, ll 16-19; Hearing Record at Page 736, ll 15-18; Hearing Record at page 479, l 21 to page 480, l 1.; See also Hearing Record at page 981, ll 7-18; page 1926, ll 1- 25; page 1927, ll 1-7; Exhibit 321.

3. Like the 2015 franchise agreement, the 2017 franchise agreement was a "form" agreement drafted by SOA and for which SOA permitted no changes. See Exhibit 11; Hearing Record at page 749 ll 16-25; Hearing Record at page 205, ll 15-25; page 206, ll 1-16.

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4. The 2017 franchise agreement did not contain, either expressly or by reference any requirement of an OLP Purchase score or OLP Service score or any OLP ranking relative to the other Subaru dealers. See Hearing Record at page 1932, ll 13-17; page 1932, ll II 21-23.

5. The 2017 franchise agreement contained a sales performance addendum, which SOA required Bert Ogden Subaru to accept as a condition to execute the agreement. Sales performance targets in this addendum were based on reaching scores that were different percentages of MSR. See Exhibit 12.

6. Both SOA's sales metric MSR (minimum sales responsibility) and the sales requirements of the 2017 Sales Performance Agreement are metrics based on a dealer's sales. See Hearing Record at page 718 ll 18-25; page 719 ll 1-5.

7. MSR is a flawed metric: Mr. Roesner addressed the fallacy of segmentation, explaining as follows: "And basically the MSR and segmentation is saying that the probability is exactly the same that somebody anywhere in the district or the zone, depending upon the benchmark being used, will buy an Outback as they will a comparable General Motors offering. And that's just not the case." See Hearing Record at Page 2274, ll 21 to page 2275, ll 1.

8. While the sales performance numbers in the addendum were not reached, Bert Ogden was never allocated sufficient inventory to achieve those sales targets. See Exhibit 321; Exhibit 172; Hearing Record at page 477, ll 3-18.

9. During the time of the Sales Performance Addendum, SOA did not allocate a number of vehicles to Bert Ogden Subaru, including MAUI units, equal to the sales requirements of the Sales Performance Agreement. See Exhibit 321; Exhibit 172; Hearing Record at page 477, ll 3-18.

10. Bert Ogden Subaru was not provided with sufficient inventory to meet the Sales Performance Addendum for the periods July 1, 2018 – June 30, 2019 and July 1, 2019 – June 30, 2020, even if it would have sold its inventory at a satisfactory sales efficiency. See Exhibit 332 at page SOA 4285 and Exhibit 172 (Bert Ogden Subaru's actual sales, plus Dave Adams additional sales computation).

11. Bert Ogden Subaru made repeated requests, which were largely ignored, for additional inventory to allow it to increase its sales. See Exhibit 310; Exhibit 325; Exhibit 435; Exhibit 408; Exhibit 409; Exhibit 410; Hearing Record at page 1263 ll 5-18.

12. Mason DeLapp agrees that he was told by Geoff Mauldin that Bert Ogden Subaru experienced employee turnover because of a lack of inventory and therefore a lack of sales. See Hearing Record at page 1304 ll 7-21.

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13. Bert Ogden Subaru did achieve growth in its actual sales numbers for the entire time period (2017-2020) of the addendum. See Exhibit 172 (sales for year end 2017-2019); Exhibit 63 (sales for year end 2020).

14. Bert Ogden Subaru's actual sales increased every year and from the end of 2017 through the end of 2021 increased approximately 52%. See Exhibit 172 (sales for year end 2017-2019); Exhibit 63 (sales for year end 2020) and Hearing Record at page 1866, ll 7-9 (sales for year end 2021).

15. In a contact report dated June 20, 2019, Dave Adams wrote that even if Bert Ogden Subaru was selling as efficiently as the Zone, based upon the inventory they were given to sell, it would sell 40 units a month. See Exhibit 321.

16. Dave Adams' testimony confirms that Bert Ogden Subaru was not being provided enough inventory, even if it was selling it at the Zone "efficiency level." Mr. Adams was asked:
Q: Well, it [Exhibit 321 - a document authored by Dave Adams] says: We're providing them with additional inventory to hit 40 units per month. That's what it says. Right?
A: Okay.
Q: Right?
A: Yes.
Q: It doesn't say at least 40 units a month or approximately 40 units a month. It says 40 units per month. Right?
A: Correct.
Q: And you know that 40 units per month would still put Bert Ogden in breach of its sales performance addendum.
A: Uh-huh.
Q: Right.
A: At this time.
See Hearing Record at page 477, ll 3-18.

17. During the time period covered by evidence admitted in this case, SOA never provided Bert Ogden Subaru with as many as 100 units at one time. The 61 units provided to Bert Ogden Subaru by SOA in November 2020 was the largest monthly allocation ever, by a factor of at least ten units. See Exhibit 141; Hearing Record at page 640 ll 17-25; page 641 ll 1; page 1790 ll 4-25; page 1791 ll 1-5; Exhibit 467 Paragraph 40-Tab 28; Exhibit 484 Paragraph 15-Tab 10.

18. SOA was aware of these numbers and the lack of inventory to meet MSR requirements, and admitted that "you need inventory to sell vehicles." See Hearing Record at page 974, ll 18-25.

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19. The number of cars that SOA provided to Bert Ogden Subaru simply was never sufficient to enable it to meet its MSR. See Exhibit 321; Exhibit 172; Hearing Record at page 477, ll 3-18.

20. During the time period covered by evidence admitted in this case, SOA never provided Bert Ogden Subaru with as many as 100 units at one time. The 61 units provided to Bert Ogden Subaru by SOA in November 2020 was the largest monthly allocation ever, by a factor of at least ten units. See Exhibit 141; Hearing Record at page 640 ll 17-25; page 641 ll 1; page 1790 ll 4-25; page 1791 ll 1-5; Exhibit 467 Paragraph 40-Tab 28; Exhibit 484 Paragraph 15-Tab 10.

21. The impact of SOA's historical failure to provide sufficient inventory is illustrated by the allocation made by SOA and the sales performance of Bert Ogden Subaru in the last quarter of 2020. When SOA finally provided a substantial number of discretionary cars in October and November 2020, Bert Ogden Subaru achieved record high sales. See Exhibit 141 and 142.

22. Exhibit 15 shows a commitment deficiency of 1 Certified Sales Manager and 1 Certified New & Used Sales Consultant. However, this commitment was made to SOA by Bert Ogden Subaru BEFORE SOA accepted and executed the agreement.

23. Exhibit 15 shows a commitment deficiency of 1 Exclusive Service Manager and 1 Exclusive Service Advisor. However, this commitment was made to SOA by Bert Ogden Subaru BEFORE SOA accepted and executed the agreement.

24. Exhibit 16 shows a commitment deficiency of 1 Certified Sales Manager and 1 Certified New & Used Sales Consultant.

25. Bert Ogden Subaru's personnel and staffing complied with the SOA requirements at all times from 2019 through the date of the NOIT. See Exhibit 17, Exhibit 18, and Exhibit 19; Hearing Record at page 1685, ll 23-25; page 1686, ll 1-25; page 1687, ll 1-25; page 1988, ll 1-25; page 1689, ll 1-15; page 1690, ll 1-25; page 1691, ll 1-9; at page 1691, ll 10-25; page 1692, ll 1-25; page 1693, ll 1-25; page 1694, l 1.

26. Geoff Mauldin testified as to the facts regarding staffing that addressed and refuted the complaint that two employees who were required to be exclusive were instead shared for the time period 2019 through 2021. See Hearing Record at page 1688, ll21-25; page 1689, ll 1-15; page 1690, ll 1-25; page 1691, ll 1-9; at page 1691, ll 10-25; page 1692, ll 1-25; page 1693, ll 1-25; page 1694, l 1.

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27. SOA is required under section 17.1.24 of the franchise agreement to notify Bert Ogden Subaru of any alleged failure to comply with the franchise as set out in subparagraphs (a)-(f) below and to provide a reasonable opportunity for Bert Ogden Subaru to cure any such claims for which notice is given prior to seeking to terminate the agreement (emphasis added):
    a. Sale of Subaru Products - 17.1.24(a);
    b. Maintenance of the Facilities and the approved location – 17.1.24(b);
    c. Service of Subaru Products – 17.1.24(c);
    d. Maintenance of net worth, net cash and networking capital in accordance with guidelines – 17.1.24((g);
    e. Fulfillment by Dealer of Dealer's warranties and obligations (17.2.24(h); or
    f. Dealer's performance under the Agreement, whether or not expressly identified herein as material in nature.
    See Exhibit 11.

G. Enforceability of the Franchise from a Public Policy Standpoint

This was a take it or leave it contract.

1. SOA's case for termination rests on its efforts to a contract it wrote and that Bert Ogden Subaru had no ability to negotiate:
    Q: There is no negotiation between a retailer and Subaru of America with regard to the terms that are included within the standard provisions. Is that true?
    A: That's true.
    See Hearing Record at page 205, ll 15-19.

2. The 2017 Franchise Agreement is a standard agreement, and it was not negotiated. The Standard Provisions in the Dealer Agreement are standard provisions and were not negotiated. See Exhibit 11; Hearing Record at page 749 ll 16-25; Hearing Record at page 205, ll 15-25; page 206, ll 1-16.

3. The 2017 Franchise Agreement contained a Sales Performance Addendum which was drafted by SOA and was not negotiated. See Exhibit 11; Hearing Record at page 749 ll 16-25; Hearing Record at page 205, ll 15-25; page 206, ll 1-16.

4. SOA is required under section 17.1.24 of the franchise agreement to notify Bert Ogden Subaru of any alleged failure to comply with the franchise as set out in subparagraphs (a)-(f) below and to provide a reasonable opportunity for Bert Ogden Subaru to cure any such claims for which notice is given prior to seeking to terminate the agreement (emphasis added):
    a. Sale of Subaru Products - 17.1.24(a);

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b. Maintenance of the Facilities and the approved location – 17.1.24(b);
c. Service of Subaru Products – 17.1.24(c);
d. Maintenance of net worth, net cash and networking capital in accordance with guidelines – 17.1.24((g);
e. Fulfillment by Dealer of Dealer's warranties and obligations (17.2.24(h); or
f. Dealer's performance under the Agreement, whether or not expressly identified herein as material in nature.
See Exhibit 11.

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Subaru's Reply to Bert Ogden's Exceptions to the PFD, Including Exhibit A

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MCALLEN JEEP, INC. d/b/a BERT OGDEN SUBARU Protestant v. SUBARU OF AMERICA, INC., Respondent	§ § § § § § § § § § §	SOAH DOCKET NO. 608-21-0988.LIC MVD DOCKET NO. 21-0004-LIC

RESPONDENT SUBARU OF AMERICA, INC.'S REPLY TO PROTESTANT'S EXCEPTIONS TO THE PROPOSAL FOR DECISION

Respondent Subaru of America, Inc. ("SOA") submits this Reply to Protestant McAllen Jeep, Inc., d/b/a Bert Ogden Subaru's ("Protestant" or "Bert Ogden") Exceptions to the Administrative Law Judges' ("ALJs") Proposal for Decision ("Exceptions").

I. INTRODUCTION

After a two-week trial on the merits, the ALJs assigned to this case entered a comprehensive, unanimous, Proposal for Decision ("PFD") finding that Bert Ogden's protest should be denied and that the termination of Bert Ogden's Subaru franchise should be approved.

In its Exceptions, Bert Ogden challenged virtually every substantive finding contained in the PFD. However, Bert Ogden has not and cannot overcome key facts that have been established in this proceeding. Among other things, the PFD and the record establish the following facts, which remain undisputed:

- Bert Ogden has failed to achieve even 50% of MSR since 2016 and has been the very worst performing retailer in the DFW Zone in terms of sales performance for several years. *See* PFD at p. 20-21; SOA's Post-Hearing Brief at p. 17.

- In its Sales Performance Addendums, Bert Ogden expressly conceded that it materially breached the terms of its Dealer Agreement by failing to meet the sales performance requirements set forth in the Agreement. *See* 2014 Sales Performance Addendum (Exhibit

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5) at p. 1; Tr. Vol. 1 at 103:16-109:3 (Poston); 2017 Sales Performance Addendum (Exhibit 12) at p. 1-2; Tr. Vol. 8 at 2117:21-2118:8 (Vackar).

- Pursuant to the terms of the 2017 Sales Performance Addendum, Bert Ogden agreed to meet substantially reduced sales performance benchmarks which equated to 50% of current MSR from July 1, 2017 through June 30, 2018; 60% of current MSR from July 1, 2018 through June 30, 2019; and 70% of current MSR from July 1, 2019 through June 30, 2020. *See* PFD at p. 20.

- Bert Ogden failed to comply with even these vastly reduced requirements under the Sales Performance Addendum, and it fell short of its total sales obligation under the Addendum by ***433 vehicle sales***. *See* PFD at p. 20 and 87; SOA's Post-Hearing Brief at p. 20.

- For years, Bert Ogden has consistently ranked last in the DFW Zone in terms of customer satisfaction with the service and purchase experience at Bert Ogden Subaru. To that end, in 2021, Bert Ogden ranked ***third to last of approximately 640 SOA retailers in the entire nation*** with respect to customer satisfaction with the purchase experience at the dealership. *See* PFD at p. 51-53 and 90; SOA's Post-Hearing Brief at p. 45-46.

- Bert Ogden's history of poor sales performance and customer service satisfaction has continued for nearly a decade despite SOA's enduring efforts to assist Bert Ogden with improving its sales and customer satisfaction performance. *See, generally,* SOA's Post-Hearing Brief and SOA's Response to Protestant's Post-Hearing Brief; *see also* PFD at p. 12-14; 36-38; 51-53; 60-63; and Findings of Fact ("FF") 21-23; 25; 32-36; 47-51; 61; 65.

As explained in detail below, and contrary to Protestant's claims, Protestant has not put forth any basis that would justify amendments to the PDF, much less a wholesale reversal of the ALJs' ultimate conclusions in this matter. Instead, Protestant's Exceptions are replete with arguments previously raised by Protestant and rejected by the ALJs. Further, Protestant has failed to articulate reasons why any specific finding of fact or conclusion of law in the PFD should be amended or rejected. For these reasons, SOA respectfully requests that Protestant's request for amendments to the PFD be denied.

II. LEGAL STANDARD

Following the issuance of a comprehensive PFD, like the one in this case, Texas law permits the parties to seek correction or amendment of that decision in two different ways. First,

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the ALJs may amend the proposal for decision: (1) in response to exceptions and replies to exceptions filed by the parties; or (2) to correct any clerical errors in the decision that do not result from judicial reasoning or determination. *See* Tex. Admin. Code § 155.507(d)(1); *Texas Dep't of Transp. v. A.P.I. Pipe and Supply, LLC*, 397 S.W.3d 162, 167 (Tex. 2013). In either case, the party seeking an amendment must state specific grounds for any such change.

After the administrative law judge makes a determination regarding any exceptions, the proposal for decision is then submitted to the Texas New Motor Vehicle Board (the "Board") for approval. 1 Tex. Admin. Code § 155.507. Under Tex. Gov't Code § 2001.058(e), the Board may modify the proposal for decision only in limited circumstances and for limited reasons "if [it] determines (1) that the administrative law judge did not properly apply or interpret applicable law, agency rules, written policies provided under Subsection (c), or prior administrative decisions; (2) that a prior administrative decision on which the administrative law judge relied is incorrect or should be changed; or (3) that a technical error in a finding of fact should be changed." *Id.* § 2001.058(e). If the Board changes a finding of fact or conclusion of law, the Board "shall state in writing the specific reason and legal basis for the change" and must "articulate a rational connection between an underlying agency policy and the altered finding of fact or conclusion of law." *Id.*; *Sanchez v. Texas State Bd. of Med. Examiners*, 229 S.W.3d 498, 515 (Tex. App. 2007).

As discussed in detail below, Bert Ogden has not and cannot identify any improper application of applicable law, any prior administrative decisions that are incorrect or should be changed, or any technical error in any findings of fact that would support modification of the PFD. Accordingly, the PFD should be adopted and approved in its entirety.

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III. ARGUMENT

In its lengthy Exceptions, Bert Ogden does not raise any challenge to several of the key Findings of Fact set forth in the PFD, including the following:

- That sales for the Subaru brand have been increasing, and have increased dramatically from a mere 7,500 units in the DFW Zone in 2009 to a total of 45,000 units in 2019. *See* PFD at FF 9.
- That Bert Ogden's area of responsibility ("AOR") under its Dealer Agreement with SOA is a growing market and is expected to continue to grow in the future. *Id.* at FF 19.
- That Bert Ogden entered into two separate Sales Performance Addenda that set out modified, lower sales requirements for Bert Ogden. *Id*. at FF 20; 21; 83.
- That Bert Ogden failed to meet even the substantially lower sales performance requirements in either of those Sales Performance Addenda. *Id*. at FF 23; 84.
- That Bert Ogden has not fully complied with the terms of its franchise agreement with SOA. *Id*. at FF 89; and
- That SOA intends to quickly establish a new replacement dealer, so any inconvenience to consumers in the market will be brief and is outweighed by the benefit the public will realize once a new dealer is established. *Id*. at FF 64.

Despite failing to challenge these critical findings (which are now deemed to be accepted), Protestant's Exceptions raise a myriad of different objections to the findings and conclusions in the PFD. These Exceptions, however, do not raise any new or novel issues of law or fact, but instead simply reiterate the same arguments that Bert Ogden made during the hearing and in its post-hearing briefs—the same arguments that the ALJs fully considered and rejected.[1] As such,

[1] Given the length and repetitiveness of Bert Ogden's Exceptions, and its apparent challenge to virtually every piece of evidence set forth in the PFD, this Response does not attempt to respond to every claim made by Protestant or restate all of SOA's arguments from its post-hearing briefs. Instead, SOA incorporates those arguments by reference, and uses this Response to focus on the "bigger picture" issues Protestant has raised in its Exceptions. SOA's decision not to address any individual issue raised by Bert Ogden's Exceptions should not be construed as assent by SOA to any of those claims.

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none of the arguments raised by Bert Ogden establish any compelling basis for the amendment or modification of any substantive finding or conclusion set forth in the PFD.

A. <u>Evidence of Bert Ogden's Many Operational Deficiencies is Highly Relevant and was Properly Considered under Texas Law.</u>

Bert Ogden first alleges that the ALJs erred as a matter of law by allowing SOA to effectively "rewrite" the Notice of Termination and by relying on evidence that it claims was not expressly set forth in the notice itself, including the extensive evidence presented about the many operational deficiencies at Bert Ogden Subaru that contribute to its poor sales and customer satisfaction performance. *See* Exceptions at p. 7-9 and 60-65. This allegation, however, is erroneous as a matter of law, inconsistent with the plain language of the relevant statutes and prior legal precedent, and misstates the contents of the Notice of Termination, itself.

Contrary to Bert Ogden's claim, Tex. Occ. Code § 2301.455(a) does ***not*** state that the evidence in a termination must be limited to the grounds for termination set forth in the notice, but instead expressly provides that the Board "***<u>shall</u> consider all existing circumstances***," including each of the seven statutory factors. *See* Tex. Occ. Code § 2301.455(a) (emphasis added). Interpreting this provision, Texas decisions have repeatedly held that "the relevant factors for the Department to consider in making a good cause determination are ***both the grounds specified by the manufacturer in the Notice of Termination as well as the statutory factors set forth in Code § 2301.455(a).***" *Cecil Atkission Orange, LLC v. FCA US LLC*, MVD Docket No. 15-0015.LIC, SOAH Docket No. 608-15-4315.LIC (Tex. Dep't. of Motor Vehicles Aug. 17, 2017) at p. 6-7 (emphasis added).[2] Accordingly, there is no support for Bert Ogden's claim that the ALJs erred in considering evidence regarding their many operational deficiencies.

[2] *See also Star Houston, Inc. v. Volvo Cars of North America, LLC*, MVD Docket No. 16-0018.LIC, SOAH Docket No. 608-16-4676.LIC (Tex. Dep't. of Motor Vehicles Oct. 12, 2020)*; Bates Nissan, Inc. v. Nissan North America,*

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There also is no support for Bert Ogden's claim that it was somehow "ambushed" by evidence of its operational deficiencies at the hearing. In addition to stating that SOA intended to terminate Bert Ogden Subaru based on its poor sales performance and "worst in class" customer satisfaction scores, as Bert Ogden admits in its Exceptions, the Notice of Termination expressly states that multiple "operational decisions and deficiencies" at the dealership contributed to its poor performance. With regard to those operational issues, the Notice of Termination states:

> SOA has determined that the dealership's material and ongoing failure to fulfill its sales performance obligations is the result of operational decisions and deficiencies directly within Bert Ogden Subaru's control, including, but not limited to: its failure to ***retain qualified management*** and ***personnel with exclusive and accountable focus on Subaru*** operations; its ***failure to adequately and effectively market and promote the sale of Subaru vehicles***; and ***dealership management's refusal and/or unwillingness to take necessary and appropriate steps to improve the dealership's sales performance and operations*** in order to meet its contractual obligations.

See Notice of Termination (Exhibit 172) at p. 4 (emphasis added). The Notice of Termination therefore gave Bert Ogden actual notice that SOA was extremely concerned with its operations, including, but not limited to, its management, staffing, and other issues.[3] Indeed, after receiving this notice, Protestants had over 16 months to conduct discovery regarding the management, personnel, marketing, and other operational deficiencies that SOA expressly informed them were contributing to its poor performance. This is hardly an ambush.

Finally, Protestant challenged the ALJs' finding that SOA takes proposed terminations "very seriously" and tries to give its retailers an opportunity to resolve any problems on the grounds that SOA allegedly did not give it an opportunity to cure these operational deficiencies, including

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Inc., MVD Docket Nos. 14-0010 LIC, 15-0013 LIC, SOAH Docket No. 608-14-3211.LIC, at pp. 5-6 (Tex. Dep't. of Motor Vehicles June 1, 2017).

[3] All of these stated grounds for termination, including Bert Ogden's poor sales performance, poor customer satisfaction performance, and its operational issues—including its management, personnel, marketing, and other business decisions—are highly relevant to the statutory factors set forth in Tex. Occ. Code § 2301.455(a).

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pursuant to Section 17 of the Dealer Agreement. This claim, however, fails for multiple reasons. First, Protestant expressly admits that SOA did, in fact, give Bert Ogden written notice and a chance to cure the deficiencies in its sales and OLP performance in the form of three separate performance addenda that were signed by Bert Ogden. *See* Exceptions at p. 9. Second, the Notice of Termination makes clear that the basis for termination here was Bert Ogden Subaru's poor sales and customer service performance as set forth in those addenda, and that its operational deficiencies were a "contributing factor" to that poor performance. *See* Notice of Termination (Exhibit 172). Moreover, there is no dispute that the operational deficiencies raised at the hearing had been ongoing for many years (if not for over a decade) before the Notice of Termination was issued, and that SOA repeatedly consulted with Bert Ogden Subaru about these issues in an effort to provide it an opportunity to address them.[4] Accordingly, there is simply no support for Bert Ogden's claim that it was ambushed by and had no opportunity to cure its operational issues prior to the Notice of Termination. Instead, the evidence made clear that Bert Ogden, simply failed to take the steps necessary to correct those deficiencies—and its performance suffered as a result.

B. <u>Bert Ogden's Long History of Poor Sales, Poor Customer Satisfaction, and Materially Deficient Operations Make it Exactly the "Type of Dealer" Subject to Termination</u>.

Despite the wealth of evidence regarding its long-term poor performance and unresolved deficiencies, Protestant also repeatedly alleged that Bert Ogden simply is not the type of failing dealer that is typically subject to termination, and that termination generally is reserved for dealers who were dishonest, falsified warranty or recall repairs, consistently failed to improve their sales,

[4] *See e.g.* 2015 OLP Performance Addendum (Exhibit 7); Sales Performance Addendum (Exhibit 12); April 2019 Contact Report (Exhibit 69) at p. 2; June 2019 Contact Report (Exhibit 70) at p. 2-3; May 2020 Contact Report (Exhibit 76); Tr. Vol. 4 at 874:24-895:20 (Yannella); Tr. Vol. 1 at 176:12-177:22 (Poston); Tr. Vol. 2 at 302:22-308:21 (Adams); Tr. Vol. 5 at 1213:7-1221:8; 1233:5-16; and 1246:17-1247:7 (Delapp).

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or consistently failed to invest in the brand. These arguments, however, mischaracterize Texas law and ignore the many deficiencies at Bert Ogden that provide the basis for this action.

First, contrary to Bert Ogden's suggestion, the Texas Code does not limit termination actions to dealers who are dishonest or submit false information. In fact, the Texas Code does not even contain any express reference to dishonesty or the submission of false information in the statutory factors. *See* Tex. Occ. Code Ann. § 2301.455(a). The Code also does not establish any single "one-size-fits-all" approach to proposed terminations, but instead expressly provides that the Board "shall consider all existing circumstances," including the seven factors set forth in Section 2301.455(a), and make a determination based on the totality of those circumstances. *Id.* Indeed, applying that express standard, this Board has previously upheld the termination of other dealers based on significant deficiencies in their performance and operations much like the ones at issue in this case, including poor sales performance, poor customer satisfaction, chronic staffing and personnel issues, and the like. *See, e.g., Cecil Atkission*, SOAH Docket No. 608-15-4315.LIC; *Star Houston,* SOAH Docket No. 608-16-4676.LIC. This case simply is not novel.

Second, although Bert Ogden repeatedly claims that it should not be terminated because it demonstrated "substantial" sales growth in the years prior to its termination, this allegation overstates the evidence to say the least. Below is chart showing Bert Ogden's sales performance in the years prior to the Notice of Termination and 2020 when it received that Notice:

	Actual Sales	Expected Sales	MSR
2016	330	885	37.29%
2017	325	855	38.01%
2018	344	780	44.10%
2019	352	946	37.21%
2020	432	867	44.85%

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See SOSA Reports (Exhibits 59-63). As this chart shows, from 2016 to 2019—one of the periods of greatest growth in the history of the Subaru brand—Bert Ogden's sales volume increased a mere 22 units or 6.25% over a total of four years. This is not "substantial" growth by any measure.

Moreover, Bert Ogden's overly-simplistic proposal for evaluating dealer sales performance—whether its sales went up or down in the years leading up to termination—is unreasonable on its face and inconsistent with Texas law. As the PFD correctly held, the Texas Code requires the Board to evaluate Bert Ogden's sales—not in isolation—but in relation to the sales in the market. Tex. Occ. Code Ann. § 2301.455(a). This is because a dealer's sales history alone does not take into consideration even the most fundamental of factors: whether that sales volume was appropriate given the size of the market and the amount of sales that could be made there. This distinction is illustrated by Bert Ogden's own sales performance. While Bert Ogden's raw sales increased slightly over time, those sales consistently accounted for just ***fractions*** of the opportunity available in this market, were ***less than half*** of its minimum sales responsibility, and were ***far short*** of the substantially reduced benchmarks set forth in the 2017 Sales Performance Addendum. *See* PFD at p. 40. Simply stated, Bert Ogden's minor improvement from "materially deficient" to "just slightly less materially deficient" over a five-year period does not save its case.

This is particularly true as it relates to Bert Ogden's performance after the Notice of Termination in 2020. While the ALJs and the Board may consider a dealer's performance after a notice of termination, the Board has specifically held "[t]hat a dealership may have improved its performance and met standards after being given notice of intended termination ***should not excuse many years of past poor performance by the dealership***." *Bates Nissan, Inc. v. Nissan North America, Inc.*, 2016 Westlaw 1534032 (Tex. SOAH Apr. 8, 2016), adopted, MVD Docket No. 14-0010.LIC, SOAH Docket No. 608-14-3211.LIC (Tex. Dept. of Motor Vehicles June 1, 2017) at 7

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(emphasis added).[5] The Board further held that post-notice performance improvements do not preclude a finding of good cause for termination. *Id*.[6] Here, while Bert Ogden did improve somewhat[7] after receiving the Notice of Termination, its performance remained materially deficient, and certainly was not enough to excuse its decades of poor performance.

Finally, in support of its claim that Bert Ogden is not the "type of dealer" that should be subject to termination, Protestant also includes several charts of various hand-picked metrics in an attempt to demonstrate that it actually is a strong performer for the Subaru brand. These charts, however, do not present the full picture and ignore the substantial evidence regarding Bert Ogden's many long-term and material shortcomings:

- **Lack of Dedication to the Subaru Brand** – Numerous witnesses testified that Bert Ogden never prioritized learning about the Subaru business model, and never invested the time, energy, or resources to succeed with the brand. *See e.g.* Tr. Vol. 4 at 1072:6-13 (Flores) ("I don't think Bert Ogden understands the brand at all"); Tr. Vol. 5 at 1253:11-18 (Delapp) ("A lack of focus from management and ownership, a lack of focus for OLP and customer experience, a lack of staffing, a lack of training, just a lack of buy-in to the Subaru culture for having a strong partnership and putting the customer experience above all else."). Indeed, Bert Ogden representatives rarely attended retailer meetings hosted by SOA, and described them as "a waste of time." *See* Lucio Designation at 28:13-29:12.

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[5] In its Exceptions, Protestant heavily criticizes the PFD's discussion of *Bates Nissan* and one other prior Board decision, *All Star Imports*, on the ground that the PFD improperly relied on those decisions when rejecting Bert Ogden's arguments about its alleged sales improvement. (Exceptions at 3-5) ("These opinions do not stand for the proposition for which they were offered and/or relied upon."). The PFD, however, did not cite those cases in support of those conclusions at all, but instead expressly noted that ***Protestant itself had relied on those cases in its post-hearing briefs*** and that ***the ALJs found those decisions to be inapposite and not persuasive***. (PFD at 39-40) ("[T]he ALJs find that argument unsupported by the caselaw Bert Ogden cites."). Protestant's lengthy discussion attempting to distinguish those decisions therefore is consistent with the PFD's findings.

[6] *See also Sweeten Truck Center, L.C. v. Volvo Trucks North America*, 2016 WL 4979826, at *2-3 (Tex. App. Austin, 2016) (holding that Sweeten Truck Center's argument that the Board should consider only the most recent data regarding dealership performance in connection with analyzing the good cause factors under Tex. Occ. Code § 2301.455(a) is too narrow. "Were we to adopt Sweeten's interpretation, a dealership could nearly always avoid a franchise modification by making improvements only after receiving notice of a proposed modification. Such a reading is not mandated by the statute's plain language.").

[7] Bert Ogden was able to increase its sales from roughly 20-40 vehicles each month to 60 sales per month in late 2020. Lytle Report (Exhibit 186) at p. 76; Tr. Vol. 5 at 1396:3-1399:21 (Lytle).

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- **Worst in Sales Performance** – Given this lack of dedication and understanding, Bert Ogden was the worst performing retailer in the entire DFW Zone in sales performance, and never made more than 49.8% of the sales expected in its market since 2016. *See* PFD at FF 25; Farhat Report (Exhibit 188) at p. 43; Tr. Vol. 6 at 1528:22-1529:18 (Farhat); *see also* Bert Ogden's 2013 – 2021 SOSA Reports (Exhibits 56 – 64).

- **Worst in Customer Satisfaction** – Bert Ogden Subaru consistently ranked among the worst performing retailers in the Zone in customer satisfaction with their purchase experience, including ranking dead last in recent years. *See* Notice of Termination (Exhibit 172) at p. 4; Lytle Report (Exhibit 186) at p. 55. In fact, in 2021, Bert Ogden's purchase satisfaction ranked ***third to last out of the 640 SOA retailers in the nation***. *See* February 2021 Letter re: OLP Performance (Exhibit 129). Bert Ogden's service satisfaction also has consistently ranked poorly and was next to last of all of the retailers in the Zone in 2020. *See* Lytle Report (Exhibit 186) at p. 56; 2019 Q4 OLP Report (Exhibit 53) at p. 45.

- **Lack of Adequate Staffing** – Unlike most of its peers, Bert Ogden Subaru has been consistently understaffed in virtually every aspect of its business. *See e.g.* Tr. Vol. 5 at 1360:8-12 (Lytle); Tr. Vol. 4 at 858:13-859:17; 860:25-861:13; 883:8-888:11 (Yannella); Tr. Vol. 5 at 1201:16-1202:7 and 1211:2-23 (Delapp); Tr. Vol. 2 at 303:1-304:9 (Adams).

- **Excessive Employee Turnover** – In addition to an overall lack of adequate staffing, Bert Ogden's performance has been substantially hindered by the frequent employee turnover in its sales and service departments, which has caused serious deficiencies with respect to training and required Subaru certifications. Tr. Vol. 5 at 1218:13-1220:17 and 1253:11-21 (Delapp); Tr. Vol. 2 at 303:1-305:15 (Adams); Tr. Vol. 4 at 858:20-859:25 (Yannella); Tr. Vol. 4 at 1011:20-1014:14 (Flores).

- **Lack of Dedicated Staffing** – Unlike most of its peers, Bert Ogden repeatedly failed to maintain employees that are dedicated to the Subaru brand. This issue was prevalent at the dealership from the top down. This includes no exclusive General Manager, F&I manager, service manager, parts manager, service advisor, or sales staff.[8]

- **Using Subaru to Sell other Brands** – There is no dispute that none of Protestant's sales consultants focus solely on selling Subarus, or that Bert Ogden's sales consultants are free to sell customers non-Subaru brand vehicles. *Id.*; *see also* April 2019 Contact Report (Exhibit 69) at p. 2; Tr. Vol. 4 at 879:21-880:10; 895:21-897:8 (Yannella); June 2019 Contact Report (Exhibit 70) at p. 2; June 24, 2019 E-mail (Exhibit 115). Indeed, Protestant's own General Manager claimed that "it's important for them to keep the customer in the Bert Ogden Family, so it's more important they sell them a car period versus a specific brand." Tr. Vol. 5 at 1254:4-21 (Delapp). Indeed, SOA discovered several times where the dealership would respond to consumer inquiries about a Subaru vehicle

[8] *See* 2017 MSOGs (Exhibit 15) at p. 3; 2018 MSOGs (Exhibit 16) at p. 3; 2019 MSOGs (Exhibit 17) at p. 3; 2020 MSOGs (Exhibit 18) at p. 3; 2021 MSOGs (Exhibit 19) at p. 3; May 2021 Contact Report (Exhibit 80) at p. 2; Tr. Vol. 2 at 303:1-305:15; 326:20-334:15 (Adams); Tr. Vol. 4 at 1046:6-1048:17 (Flores). Tr. Vol. 4 at 858:13-859:17, 860:25-861:13 and 883:8-888:11 (Yannella); Tr. Vol. 5 at 1201:16-1202:7, 1211:2-23 (Delapp).

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with information—not about a Subaru—but about vehicles of another brand such as Mazda or Volvo. *See, e.g.,* Exhibit 115; Tr. Vol. 4 at 861:14-862:19; 895:21-897:8; and 897:18-898:5 (Yannella).

- **Poor Handling of Consumer Leads** – Bert Ogden has routinely employed an insufficient number of BDC personnel to respond to internet inquiries or "leads" from customers who have expressed interest in purchasing a Subaru vehicle. Tr. Vol. 4 at 861:14-862:19 and 881:24-883:15 (Yannella). For example, in 2019, Bert Ogden had ***only one BDC agent*** responding to about 400 inquiries per month—more than 2.5 times the amount that its own BDC Director admitted any agent could handle. *See* June 2019 Contact Report (Exhibit 70) at p. 2; Tr. Vol. 4 at 881:19-884:6 (Yannella); Castillo Designation at 72:10-20. Accordingly, Bert Ogden consistently had some of the slowest response times of any dealers in the District, and one of the lowest sales "close rates" in the Zone. *See* June 2019 Contact Report (Exhibit 70); August 2019 Contact Report (Exhibit 71); Tr. Vol. 4 at 881:19-884:6; 904:3-906:13 (Yannella).

- **Insufficient Parts Inventory** – Bert Ogden's own financial statements report that the dealership has fractions of the parts and accessories inventory compared to other similarly sized Subaru retailers in the Zone, including times where it reported just $5 in parts per VIO or ***nine to ten times less*** than other retailers of the same size. *See* Lytle Report (Exhibit 186) at p. 11 and 51.

- **Insufficient Service Equipment** – Bert Ogden's own financial statements report that the dealership maintained mere fractions of the service equipment compared to other similarly sized Subaru retailers in the Zone, including times where it reported ***just $4,375 in service equipment*** for the Subaru brand or about ***63 times less*** than other retailers of the same size. *See* Lytle Report (Exhibit 186) at p. 12 and 52.

- **Denying Warranty Service** – Bert Ogden refuses to provide vehicle maintenance services for Subaru vehicles over ten years old or with more than 100,000 miles. Tr. Vol. 4 at 863:2-864:3 (Yannella). Although Protestant alleges this was a one-time mistake during a mystery shop, Bert Ogden's own General Manager explained this policy in detail as being necessary for older vehicles "the parts are too brittle at that point" and "could potentially break." Tr. Vol. 4 at 864:4-20 (Yannella). Bert Ogden's former General Manager also testified that the dealership had this same policy when he was managing the store. *See* Lucio Designation at 8:2-21; 11:8-12:19; 71:22-72:2 and 78:18-25.

These examples of Bert Ogden's operational deficiencies all constitute material breaches of the Dealer Agreement, are directly relevant to the statutory factors set forth in Tex. Occ. Code Ann. § 2301.455 and support the PFD's recommendation that Bert Ogden's franchise be terminated.

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C. <u>The PFD Correctly Found that Bert Ogden's Poor New Vehicle Sales in Relation to the Market Supports Termination of its Subaru Franchise</u>.

Aside from Protestant's discussion about the minimal increase in its sales leading up to the Notice of Termination, there is no genuine dispute that Bert Ogden's sales performance was materially deficient and had been for decades. As the PFD found, Bert Ogden consistently has been the lowest-performing retailer in the entire DFW Zone for many years. *See* PFD at FF 25; Farhat Report (Exhibit 188) at p. 43; Tr. Vol. 6 at 1528:22-1529:18 (Farhat); *see also* Bert Ogden's 2013 – 2021 SOSA Reports (Exhibits 56 – 64). When compared to the amount of opportunity available in its own market, Bert Ogden's sales volume never crested 50% of that opportunity in any of the five years prior to its termination. *Id.* Indeed, Bert Ogden's MSR percentages for 2016, 2017, 2018, 2019 and 2020 were 37.3%, 38.0%, 44.1%, 37.2%, and 49.8%, respectively. *Id.*

There also is no dispute that the above level of performance is extremely poor and constitutes a material breach of the Dealer Agreement. Bert Ogden admitted as much in writing. As outlined throughout this case, on July 28, 2017, Bert Ogden executed a 2017 Sales Performance Addendum expressly admitting that: (1) its performance has failed to meet the Subaru minimum standards set forth in the Dealer Agreement as evidenced by its MSR; and (2) this failure to meet MSR "constitutes a material breach of the Agreement." *See* Sales Performance Addendum (Exhibit 12). In an effort to work with Bert Ogden, this Addendum also provided the dealership a three-year window of time to achieve substantially reduced sales performance benchmarks that were materially lower than its "expected sales" would be based on MSR alone:

- Increase Subaru new vehicle sales to 50% of current MSR or a total of 430 new Subaru vehicle sales within the twelve-month period starting July 1, 2017, and ending June 30, 2018.[9]

[9] The Sales Performance Addendum allowed Bert Ogden to comply with sales performance benchmarks that were even lower than the benchmarks specifically listed in the Addendum if market conditions resulted in a decrease in Bert Ogden's MSR requirements at any point during the 3-year term of the Addendum. *See id.*

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- Increase Subaru new vehicle sales to 60% of current MSR or a total of 516 new Subaru vehicle sales within the twelve-month period starting July 1, 2018, and ending June 30, 2019.

- Increase Subaru new vehicle sales to 70% of current MSR or a total of 602 new Subaru vehicle sales within the twelve-month period starting July 1, 2019, and ending June 30, 2020.

Id. Bert Ogden further agreed that its failure to achieve these benchmarks "shall constitute a material breach" of the Dealer Agreement. *Id.* at p. 2. Bert Ogden, however, failed to meet even the vastly reduced sales performance requirements in the Addendum. *See* Notice of Termination (Exhibit 172) at p. 3. Indeed, Protestant's Exceptions do not even challenge the Finding of Fact that Bert Ogden failed to meet these substantially reduced benchmarks. *See* PFD at FF 23.

In its Exceptions, Protestant largely ignores the 2017 Sales Performance Addendum, including the fact that: (1) SOA voluntarily provided this dealer substantially reduced sales benchmarks; (2) Bert Ogden failed to meet any of these reduced benchmarks; and (3) Bert Ogden agreed that its failure to meet those benchmarks would be a material breach. Instead, Protestant devotes the majority of its brief to attacking SOA's standard measurement of dealer performance—MSR—and alleging that it is not a reliable measure of sales performance. These arguments not only ignore the importance of the Sales Performance Addendum, but also are misplaced and unsupported by the evidence in this case.

1. MSR is a Reasonable and Reliable Sales Performance Metric.

Although Protestant alleges that MSR is not a reasonable metric, there is no dispute that MSR is the industry standard for evaluating dealer sales performance and is used (with some slight variations) by virtually all automotive companies in the United States. Farhat Report (Exhibit 188) at p. 6; Tr. Vol. 6 at 1487:3-1488:10 (Farhat). This metric evaluates a dealer's sales in relation to

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the market, as required by Texas law, by comparing the number of actual sales made by the retailer to the number of sales it would be expected to make in its specific market. Farhat Report (Exhibit 188) at p. 5-6; Tr. Vol. 6 at 1487:3-1488:25 (Farhat). Expected sales or MSR is calculated by: (1) multiplying the total number of competitive vehicles registered in its particular AOR by the average market share that Subaru achieves in its competitive segments within the District; and (2) then segment adjusting the data to account for any socioeconomic factors (such as age, income, or local economic factors) that may impact the specific type of vehicles consumers are purchasing in the market. Farhat Report (Exhibit 188); Tr. Vol. 6 at 1488:11-25; 1505:14-1510:13 (Farhat).

This metric also is a very reasonable, conservative, and achievable standard for evaluating retailer sales performance. In fact, MSR is so reasonable that approximately 72% of all Subaru retailers in the DFW Zone consistently achieve or exceed 100% of MSR, and from 2016 to 2020, the average percent of MSR by retailers in the Zone was 138.3%. Farhat Report (Exhibit 188) at p. 8; 46; Tr. Vol. 6 at 1522:20-1524:6; 1534:4-12 (Farhat). Indeed, other than Bert Ogden—which performed a full 20 percentage points below the next lowest retailer in the Zone—only 5 of the other 42 retailers in the Zone had average MSR scores in the range of 60% to 80% from 2016 to 2020. Farhat Report (Exhibit 188) at p. 44-45. As such, there is no support for the claim that Bert Ogden did not have a reasonable opportunity to achieve MSR—or the substantially reduced benchmarks set forth in the Sales Performance Addendum.

Despite these facts, Bert Ogden cites to several prior decisions in other matters in an attempt to show that MSR must be unreasonable because some courts have criticized the use of similar performance metrics by other automotive companies in certain situations. These arguments, however, ignore the prior decisions in Texas affirming the use of sales effectiveness as

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a reasonable and appropriate measurement of dealer performance.[10] Moreover, as the PFD properly held, the decisions relied on by Bert Ogden are wholly distinguishable from this case.

Protestant first cites to the New York decision in *Beck Chevrolet*, which held that General Motors' sales performance metric was not reasonable or appropriate in that specific case. *Beck Chevrolet Co., Inc. v. General Motors LLC*, 53 N.E.3d 706 (N.Y. 2016). In that decision, the court found that General Motors uses of a statewide benchmark for evaluating dealer performance was unreasonable under the circumstances in that case because there was a measurable difference in brand performance between upstate New York and downstate New York where the dealer was located. *Id.* at 711; 713. Indeed, this difference was so prominent that only 4 of the 23 dealers in the downstate were able to achieve 100% RSE. *See Beck Chevrolet Co. v. General Motors LLC*, Docket No. 34452, at pp. 4, 13 (NY DMV May 31, 2016) (attached as **Exhibit A**). Moreover, Beck was not the worst performing dealer in the state by a long shot, and when Beck was compared to the other Chevrolet dealers under a more local "downstate" standard, its performance was in the "middle of the pack." *Id.* Accordingly, the *Beck* decisions held that General Motors' efforts to terminate only this one dealer rendered the standard "unreasonable in its application." *Id.*

These circumstances are wholly inapposite to the present case. As set forth above, SOA did not evaluate Bert Ogden's performance using a statewide benchmark at all, but instead used a more local, reasonable, and conservative standard—a district average—just like was suggested in *Beck*, itself. In addition, there is no suggestion that SOA's standards were unreasonable or unreasonably applied in this case. As set forth above, Bert Ogden Subaru consistently was the lowest performer in the entire state of Texas, not by a little, but by a full 20 percentage points. Farhat Report (Exhibit 188) at p. 44-45. Moreover, given the more localized standard used by

[10] *See, e.g., Cecil Atkission*, SOAH Docket No. 608-15-4315.LIC; *Star Houston,* SOAH Docket No. 608-16-4676.LIC.

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SOA, approximately 72% of the Subaru retailers consistently achieved 100% MSR or more. Farhat Report (Exhibit 188) at p. 8; 46. The circumstances at issue in this case are very different from those at issue in *Beck*.

The same is true of the other case relied on by Bert Ogden. *See Bates Nissan, Inc. v. Nissan North America, Inc.*, MVD Docket Nos. 14-0010 LIC, 15-0013 LIC, SOAH Docket No. 608-14-3211.LIC (Tex. Dep't. of Motor Vehicles June 1, 2017). In that case, Nissan sought to terminate the subject dealer not using a localized standard such as district average, but instead using a Central Region benchmark that included 14 entire states. *Id.* at 8. In addition, while the Nissan dealer was a consistent underperformer, its sales effectiveness improved to over 100% prior to the issuance of the notice of termination. *Id.* at 11. Despite this fact, the Board did not reject the use of sales effectiveness as a reliable metric (as Protestant claims), and even noted that it is "a reasonable tool to measure and compare NNA's dealers in regard to their sales." *Id.* at 12. Instead, that decision simply held that Nissan's sales effectiveness metric was not adequately incorporated into the Nissan Dealer Agreement and thus could not be used to measure its performance under the contract. *Id.* 12-14. This same concern, however, is not an issue in this case given Bert Ogden's execution of the 2017 Sales Performance Addendum and express acknowledgement that MSR is the proper measure of performance under the Dealer Agreement and that Bert Ogden's failure to achieve MSR and the reduced benchmarks in the addendum constitute a material breach of the Dealer Agreement. *See* Sales Performance Addendum (Exhibit 12).

2. Protestant's Arguments Regarding Segmentation Misconstrue SOA's Position, the True Purpose of MSR, and the Evidence in this Case.

In its next attempt to discredit the use of MSR in this case, Protestant claims that SOA and its witnesses have hailed segmentation as "the panacea" that renders its sales performance metrics reasonable and appropriate, then launches an attack against this self-proscribed argument. *See*

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Exceptions at p. 30-33. Contrary to Protestant's assertion, however, SOA is not alleging that MSR is reasonable solely because of its use of segmentation. Instead, SOA's witnesses expressly testified that there are several adjustments embodied within SOA's sales performance metric that, when taken together, operate to account for local market factors and consumer preferences:

- MSR is based only on competitive vehicles, and thus accounts for markets where consumers may have a preference for luxury vehicles, large SUVs, or pickup trucks that are not part of Subaru's product offerings. Tr. Vol. 1 at 95:22-65:4 (Poston).

- A retailer's MSR is based on the total number of industry registrations that were made in its particular AOR only, which accounts for any local market or economic factors that might affect consumer buying patterns in that market. Tr. Vol. 6 at 1552:17-1553:8 (Farhat); Tr. Vol. 4 at 857:10-24 (Yannella).

- SOA does not use a statewide average, but instead uses a District 3 average benchmark, which is more local and better reflects market conditions in this portion of the state. Farhat Report (Exhibit 188) at p. 33; Tr. Vol. 1520:23-1521:12 (Farhat).

- SOA's calculation of MSR also is "segment adjusted" to account for "age, income, and other socioeconomic factors that impact the type of vehicles consumers purchase to meet their transportation needs" within a particular market. Farhat Report (Exhibit 188) at ¶ 19.

In addition to all of the adjustments above, SOA provided Bert Ogden Subaru a Sales Performance Addendum that substantially reduced its sales performance benchmark and only obligated the dealer to achieve fractions of the MSR calculation (50%, 60%, and 70%). Given all these adjustments and concessions, there is simply no support for Protestant's claim that SOA is relying solely on segmentation or that its sales performance standards in this case were unreasonable.

Protestant next offers two charts that contain revised versions of SOSA Reports and select examples of certain vehicles for which actual sales were either higher or lower than "expected." Protestant then relies on these charts to allege that segmentation must not be an accurate "predictor" of sales in the Pharr AOR. This argument misses the point. It is well established that MSR is not a "predictor" of what a particular dealership's ***actual sales*** of a particular model will

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be, but instead is a rear-facing calculation of the amount of ***sales opportunity*** that was available in the market during that particular time period. How the dealership's actual sales will compare to that level of opportunity, however, depends on numerous factors—including many factors within each dealer's control. Indeed, Protestant's own expert agreed that a dealer's sales performance can be affected by that dealer's pricing, personnel, advertising, reputation, internal processes, business development programs, employee training, and other factors. Tr. Vol. 9 at 2388:12-2389:5 (Roesner). Accordingly, Protestant's reference to a few select charts showing that some vehicles sales were higher than expected and others were lower than expected proves little.[11]

Protestant's attack on Mr. Farhat's regression model also fails for these same reasons. In his expert report, Mr. Farhat prepared two separate regression analyses which showed there is a strong relationship or correlation (of 54% to 91%) between a dealer's actual sales and the "expected sales" in the market as calculated using MSR. Farhat Report (Exhibit 188) at p. 20-21; Appendix (Exhibit 189) at p. 2-3.[12] Relying on these analyses, Protestant then alleges that SOA's expert "admitted" that some percentage of dealership sales must be correlated to some factor other than MSR, as if this is some major concession. It is not, and in fact, we agree. As set forth above,

[11] Protestant also cites the decision in *Austin Chevrolet, Inc. v. Motor Vehicle Bd.*, 212 S.W.3d 425 (Tex. App. 2006), as an example of a case in Texas criticizing sales effectiveness and segment adjusting. That decision, however, did not reject sales effectiveness at all. Instead, like the other decisions cited by Protestant, the court found that General Motors' use of a ***statewide average*** was less appropriate under the facts of that case, and found that using segmentation to adjust that ***statewide average*** alone did not account for all relevant factors—particularly where General Motors refused to address any of the criticisms of that standard raised by the dealer. *Id.* at 436-37. Importantly, however, the court expressly found that the use of sales effectiveness under narrower standard—the multi-dealer areas within Texas—was a reasonable and appropriate standard. *Id.* As discussed above, SOA similarly used a more narrowly focused and more local standard in this case.

[12] In a disingenuous attempt to discredit SOA's expert witness, Protestant claims that he "intentionally manipulated" his regression analyses by forcing the Y intercept to zero. Exceptions at 17. This allegation is simply false. As Protestant well knows, Mr. Farhat expressly testified that there are two different ways to perform these regressions—forcing the intercept through zero and not forcing the intercept through zero—and there are criticisms to both approaches. Tr. Vol. 6 at 1592:2-11 (Farhat). For that reason, Mr. Farhat expressly ran his analysis both ways for the ALJs, and both ways showed a strong relationship between sales and the sales expected in the market. *Id.*

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all parties—including Protestant's own expert—agree that a dealer's actual sales results can be substantially impacted by many factors within its own control, including the dealer's pricing, personnel, advertising, reputation, internal processes, business development programs, employee training, and other factors. Tr. Vol. 9 at 2388:12-2389:5 (Roesner).

As set forth in the Notice of Termination itself, and as proven by the great weight of the evidence, Bert Ogden Subaru's material and ongoing failure to fulfill its sales performance obligations is the result of numerous operational deficiencies directly within its control, including, but not limited to: (1) its lack of dedication to the Subaru brand; (2) inadequate staffing levels; (3) excessive employee turnover; (4) lack of dedicated staffing; (5) poor leads management; (6) poor customer satisfaction; (7) cross-selling of other brands from the Subaru dealership; (8) insufficient parts inventory; (9) insufficient service equipment; and (10) improper warranty handling processes. *See* Supra, at Section B; Notice of Termination (Exhibit 172) at p. 4. All of these examples of the many operational and performance deficiencies at Protestant's dealership support the PFD's finding that Bert Ogden's sales have been poor in relation to the sales available in the market, and the PFD's conclusion recommending termination of its Subaru franchise.

3. Protestant's Consistently and Materially Poor Sales Performance was not Caused by the Demographics in its Local Market.

Part and parcel with its arguments above, Bert Ogden's Exceptions next restate the claim from its Post-Hearing Briefs that its sales performance is poor because the demographics in its AOR are not conducive to the sale of new vehicles (and particularly Subaru vehicles) due to the fact that consumers in its market generally are younger, less educated, Hispanic, and lower earning than consumers in other markets throughout the Zone. This allegation fails for several reasons.

First, there is zero evidence in the record that this particular market is not conducive to the sale of new vehicles. To the contrary, the evidence is undisputed that the Pharr AOR contains

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nearly 1 million residents, and the population and number of households in this market has been rapidly growing since at least 2010. Farhat Report (Exhibit 188) at p. 63-67. It is also undisputed that this market has benefitted from high and increasing levels of employment throughout the last decade, and that there are numerous households with annual income exceeding $25,000—including 71,000 households in this market with earnings of $75,000 or more. *Id.* at p. 68; 71-72. Given these strong economic conditions, it is no surprise that this area contains dozens of automotive dealerships, including dealerships for luxury brands like Maserati, Lamborghini, Mercedes, BMW, and Lexus. *Id.* at p. 70. This is hardly a depressed market.

Indeed, Bert Ogden's own dealer principal testified that this is a thriving area that can support a significant amount of new vehicle sales. Specifically, Mr. Vackar acknowledged that the Rio Grande Valley is not an economically struggling market, and instead testified that he agrees this area is "growing by leaps and bounds." Tr. Vol. 8 at 2099:23-2100:5 (Vackar). Mr. Vackar also admitted that he has so much confidence in this market that he owns 22+ automotive franchises in the Valley, including several franchises for luxury brands like Cadillac, Maserati, Infiniti, and BMW. *Id*. at 2100:7-2101:4. The Bert Ogden Group has also been in the process of several large development projects for its various dealerships in the Valley, including a $12 million new dealership facility for Cadillac, a $10-to-$12 million new facility for BMW, and additional new facilities for its Hyundai, Genesis, and Chrysler-Jeep dealerships. *Id*. at 2101:5-2102:12.

Even more relevant here, however, Bert Ogden's own witnesses admitted the Pharr AOR actually is a strong market for the Subaru brand. Mr. Vackar expressly testified that he believes Subaru vehicles are a "great product," and has confidence that the Subaru brand can sell in the Valley. Tr. Vol. 8 at 2108:2-16 (Vackar). Indeed, Mr. Vackar admitted he has so much confidence that the Subaru brand can be successful in the Valley that he would like to open a second Subaru

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dealership in this same area, and he is willing to invest millions to construct such a facility. *Id*. at 2108:17-2109:24. Mr. Vackar also testified that he wouldn't be willing to invest millions of dollars in a new dealership if he didn't believe the Valley could support the Subaru product. *Id.*

Despite these admissions from its own dealer principal, Protestant still alleges that local demographics are the problem and relies on several regressions from its expert in an attempt to prove that point.[13] However, Mr. Roesner's own regressions proved that two of the biggest factors Protestant raised during the hearing—household income and percentage of Hispanics—had no statistically significantly correlation to achievement of MSR. *See* Regression Analyses (Exhibits 493 and 499); Tr. Vo. 9 at 2421:6-25 (Roesner). Although Protestant repeatedly argued that Bert Ogden was at a disadvantage because the Subaru brand performs better in markets with greater snowfall, this argument also proved to be a "distinction without a difference" given that none of the AORs in District 3 had annual snowfall of over 0.24 inches. *See* PFD at p. 28. Similarly, although Protestant claimed that customers in its market are younger and less educated, the retailer with the lowest median age in its AOR was achieving 115.7% of MSR, and several retailers with the lowest level of college degrees and high school diplomas were performing well above 100% MSR, including stores that achieved MSR scores of 103.1%, 125.9%, 132%, and 135.9%. Farhat Rebuttal (Exhibit 190) at p. 14-17. Accordingly, Protestant's claim that the demographics in its

[13] Protestant also retreads its argument that this market must be unfavorable for the Subaru brand because the previous Subaru retailers who operated in this market before 2009 were unsuccessful. As the PFD correctly found, however, the history of the previous Subaru retailers in this market from 13 years ago (and more) is entirely irrelevant here. As set forth at the hearing, it is undisputed that the Subaru brand is very different today that it was in 2009—and particularly in Texas. As of 2019, the Subaru brand experienced twelve consecutive years of sales growth, and from 2009 to 2019, the number of Subaru vehicle sales in the DFW Zone grew from a mere 7,500 sales to approximately 45,000 sales—and increase of 500% in just 10 years. Tr. Vol. 1 at 68:16-69:21 (Poston). In addition, over the past decade, the Rio Grande Valley has been "booming in terms of economic opportunity" and has seen significant growth since 2010. *See* Farhat Report (Exhibit 188) at p. 63-66; Tr. Vol. 6 at 1553:9-1556:25 (Farhat). Accordingly, the experience of the previous Subaru retailers in the Valley from 13 years ago has no bearing on the market today.

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AOR are the cause of its poor performance simply is not supported by the evidence and is directly contradicted by its own testimony and that of its expert witness.

4. Bert Ogden had more than Sufficient Inventory to Support and Grow its Sales.

Immediately after claiming that local market factors are hindering the sale of Subaru products in its AOR, Bert Ogden takes the wholly contradictory position that it actually needed more Subaru vehicles to sell to consumes in this same market. Contrary to this claim, there is substantial evidence supporting the finding that Bert Ogden had more than sufficient inventory, and that a lack of inventory was not the cause of its poor sales performance. *See* PFD at FF 49-51. Indeed, Protestant actually had an inventory advantage over the other Subaru retailers in the Zone in virtually every month from January 2016 to June 2021. During that time period:

- Bert Ogden Subaru consistently had a ***higher days' supply of vehicles*** than the other retailers in the DFW Zone—not a lower supply as Protestant suggests. Lytle Report (Exhibit 186) at p. 73-74; Tr. Vol. 5 at 1390:11-1391:2 and 1392:15-1393:19 (Lytle).

- Despite having higher inventory levels, Bert Ogden consistently had a ***lower "sales to availability"*** than the other retailers in the Zone. Lytle Report (Exhibit 186) at p. 76; Tr. Vol. 5 at 1396:3-1398:16 (Lytle). This means that Bert Ogden actually was making fewer sales out of its inventory than other retailers, and that its sales pace was substantially slower than other Subaru retailers in the Zone. *Id.* at 1401:3-14.

- Bert Ogden had additional inventory available that it could have used to make more sales in every month—including many months where it had 40 or more additional units it could have sold. *Id.* at 1399:6-9; Lytle Report (Exhibit 186) at p. 76.

In addition, from January 2015 to February 2021, SOA provided Bert Ogden a total of ***484 MAUI vehicles*** above and beyond its earned allocation—the third highest level of MAUI relative to sales of any retailer in the DFW Zone. *See* Allocation History (Exhibit 141); Lytle Report (Exhibit 187) at p. 21; Tr. Vol. 10 at 2458:9-2459:14) (Lytle). These facts are wholly undisputed. Indeed, Plaintiff's own expert admitted that (1) Bert Ogden's days' supply consistently exceeded Zone average; (2) Bert Ogden consistently sold its vehicles more slowly than Zone average; and (3) the

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number of MAUI units allocated to Bert Ogden relative to its sales was higher than Zone average. Tr. Vol. 9 at 2427:8-17; 2432:13-17; 2434:3-6 (Roesner).[14]

Protestant does not challenge any of these facts. Nevertheless, Bert Ogden still attempts to levy several challenges to the findings in the PFD on allocation—all of which lack merit.

Subaru Cannot Establish a New Allocation System Just for Bert Ogden.

Protestant alleges the PFD should be amended because it is based on the assumption that Bert Ogden should have learned to operate under SOA's allocation system, rather than finding that SOA should be forced to revise its nationwide allocation system in order to accommodate Bert Ogden's preferred business model. This assertion lacks credibility and is not supported by the facts. As set forth at the hearing, SOA has established a uniform system for distributing its vehicles to all Subaru retailers nationwide in order to ensure that its system is fair to all of those retailers. Tr. Vol. 2 at 539:14-540:22 (Teti). This system, which is based in large part on days' supply, is the same type of allocation system used by virtually every automotive company in the country. Tr. Vol. 5 at 1385:10-19 (Lytle); Tr. Vol. 9 at 2426:21-24 (Roesner). Given these facts, there is no support for Protestant's claim that SOA should abandon its uniform allocation system, disregard industry standard processes, and establish a special allocation process that benefits Bert Ogden to the detriment of other Subaru retailers. Indeed, as the PFD found, this is not a reasonable approach and would undermine SOA's entire allocation system. *See* PFD at p. 35; Tr. Vol. 2 567:6-15 (Teti).

[14] On Page 20 of its Exceptions, Bert Ogden sets forth a chart identifying seven instances where it asked SOA for additional inventory in an attempt to show that allocation must have been the problem. This chart, however, only tells half the story. Although Protestant chose not to share this fact, the record is replete with evidence that SOA actually did provide Bert Ogden Subaru additional inventory not once or even seven times, but in almost every month from January 2015 to February 2021. (*See, e.g.,* Exhibits 118, 120, 121, 124, 141, 144, 147, 148). During that time period, SOA provided Bert Ogden Subaru with a total of ***484 MAUI vehicles*** above and beyond its earned allocation. *See* Allocation History (Exhibit 141); Tr. Vol. 2 at 580:14-582:15 (Teti); Tr. Vol. 1 at 140:18-141:17 (Poston).

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The Fact that Bert Ogden "Eventually" Sold Every Vehicle it Received is a Red-Herring.

Although Bert Ogden's inventory levels were consistently higher than the other Subaru retailers in the Zone, Protestant next alleges that its inventory must have been the problem because it sold every vehicle that was allocated to it. *See* Exceptions at p. 19. This allegation, however, demonstrates a complete misunderstanding of how SOA's allocation systems work. As explained at the hearing, a retailer's allocation of vehicles is determined in large part by one primary factor—its sales. Tr. Vol. 6 at 1470:3-15 (Lytle). Given this fact, it is a self-fulfilling prophecy that there will be a correlation between a retailer's sales and its allocations. *Id.* at 1454:14-1456:13 (Lytle). It also is axiomatic that every retailer will eventually sell every vehicle allocated to them. *Id.* at 1454:14-1456:13 (Lytle). As such, the proper question is not whether a retailer actually sold the vehicles it received, but whether it sold those vehicles quickly and efficiently in order to earn more in the future. Once again, it is undisputed that Bert Ogden consistently (1) sold its vehicles more slowly and (2) made fewer sales compared to its available inventory than other retailers. Lytle Report (Exhibit 186) at p. 76; Tr. Vol. 6 at 1396:3-1398:16; 1471:13-15 (Lytle). This track record of doing less (sales) with more (inventory) demonstrates that the cause of Bert Ogden's poor performance was its own operations, not SOA's allocation system.

MAUI and SSLP Units are not the Cause of Bert Ogden's Poor Performance.

Protestant also claims that the PFD's conclusions on allocation are incomplete and misstate the record because they allegedly fail to address the significance of MAUI and SSLP units. Bert Ogden first challenges the PFD's findings that Bert Ogden regularly had a greater days' supply of vehicles than other Subaru retailers on the basis that these conclusions do not appropriately consider the impact of MAUI and SSLP units, which it believes "greatly impact" a dealer's allocations. Contrary to this allegation, however, SOA's calculations of days' supply—in the

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ordinary course of business and for purposes of this hearing—were not limited to vehicles allocated under its computerized methodology, but specifically included all vehicles allocated to Bert Ogden—including MAUI and SSLP units. Tr. Vol. 2 at 574:8-23 (Teti). Accordingly, as set forth above, Bert Ogden's relative level of inventory was higher than the other retailers in the Zone even when all MAUI and SSLP units are taken into account.[15]

In addition to the claim above, Protestant also alleges that the PFD erred in not addressing SSLP vehicles because those units can be reported as sold immediately and thus can speed up the dealer's sales rate. *See* Exceptions at p. 42-45. Although Protestant relies heavily on the testimony of its expert, that same expert admitted he was not familiar with SOA's process for allocating SSLP units in the first place. Tr. Vol. 9 at 2438:17-25; 2447:6-11 (Roesner) ("I don't personally know."). This admission is significant because the only evidence at trial is that SSLP vehicles are not allocated by SOA at all, but instead are ***ordered by each dealer*** up to a pre-determined level that is consistent for all dealers. Tr. Vol. 10 at 2464:14-2466:12 (Lytle). Accordingly, if there is a disparity in the amount of SSLP units that Bert Ogden received, that disparity would be the result of Bert Ogden's own decision not to order more units—not any decision by SOA. *Id.*[16]

[15] Protestant once again claims that Mr. Adams misled the ALJs by testifying that Bert Ogden received the most MAUI vehicles of any retailer in the DFW Zone. See Exceptions at p. 39-40. This allegation ignores the testimony in this case about what vehicles actually constitute MAUI units. Tr. Vol. 2 at 480:18-21 (Adams) ("I think we're going to have an issue with what the definition of a MAUI unit is."). As explained at the hearing, SOA's records reflecting the number of MAUI units received by a dealer are not limited solely to "discretionary" units, but includes vehicles that are provided to dealers for many reasons, including under SOA's service loaner program, for facility relocations and renovations, for the opening of a new dealership, and related to dealership buy-sells. Tr. Vol. 2 at 430:16-24 (Adams); Tr. Vol. 2 at 565:20-566:11(Teti); Allocation Methodology (Exhibit 20). As Mr. Adams attempted to explain at the hearing before being cut off, aside from those other categories of vehicles, Bert Ogden Subaru did in fact receive among the highest—if not the highest—amount of pure "discretionary" MAUI units of all retailers in the Zone. *Id.*; *see also* Exhibits 510 and 511.

[16] SOA's expert also analyzed Bert Ogden's day's supply, excluding SSLP units, and found that there was no material change in its inventory levels relative to other retailers. Tr. Vol. 10 at 2461:2-2463:22 (Lytle); Exhibit 194.

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Bert Ogden's Ability to Increase Sales Post-Termination Show the Flaws in its Case.

Protestant also alleges that the PFD's findings on allocation are incorrect because Bert Ogden was able to increase its sales after the Notice of Termination when it received 45 additional MAUI vehicles, which allegedly shows that allocation was the issue all along. This argument clearly misstates the evidence at the hearing. As an initial matter, the PFD correctly found that SOA provided Bert Ogden with consistent MAUI support not just in those months, but for years leading up to the NOT. Allocation History (Exhibit 141). In fact, there were several time periods where SOA provided Bert Ogden even more MAUI units, including 62 units over a five-month period in 2016, and 52 units over a four-month period in 2019. *Id.* None of these efforts, however, resulted in any notable improvement to Bert Ogden's sales rate. Days' Supply Chart (Exhibit 142); Tr. Vol 3 at 598:9-599:12 (Teti).

Moreover, while Protestant was able to increase its sales rate around the time of the Notice of Termination, the data actually shows a different cause for that increase. Unlike previous times when the dealership received significant additional vehicles but failed to improve its sales performance, faced with potential termination, Bert Ogden suddenly was able to increase its efficiency and sell deeper into its inventory than ever before. Tr. Vol 3 at 599:13-601:12 (Teti); Tr. Vo. 5 at 1396:25-1399:21 (Lytle). While not sustained, this short-term increase in sales demonstrates that Bert Ogden's historical poor sales performance over the past many years was a result of its lack of effort and operational deficiencies—not SOA's allocation system.

D. Customer Service Satisfaction and SOA's Owner Loyalty Program.

In another attempt to challenge the legitimacy of the PFD, Bert Ogden has raised three primary objections to the ALJs' findings and conclusions regarding SOA's method of evaluating customer service satisfaction, which is known as the Owner Loyalty Program or "OLP."

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Specifically, Protestant contends that Bert Ogden cannot be terminated for poor customer service satisfaction scores because: (1) OLP performance is not an obligation under the Dealer Agreement; (2) despite Bert Ogden's low OLP survey score rankings relative to other retailers, Bert Ogden's customers scored the dealership closer to "extraordinary" than "very good" on customer surveys; and (3) SOA has recently abandoned its use of the OLP system in gauging customer service satisfaction levels. *See e.g.* Exceptions at p. 6-8 and 22-25. As explained below, not only are these arguments erroneous, but they have also been previously considered and rejected by the ALJs.

1. Protestant's Dealer Agreement Contains Customer Service Obligations and Protestant has Materially Breached those Obligations.

Bert Ogden's contention that its Dealer Agreement does not contain customer satisfaction obligations is simply false. *See* Exceptions at p. 6. It is undisputed that pursuant to the Dealer Agreement, Bert Ogden committed to, among other things, achieving "the highest level of customer satisfaction possible" and providing "the best possible customer service." *See* Dealer Agreement (Exhibit 11) at p. 11 and 19. In addition, Bert Ogden's Dealer Agreement—like the dealer agreements of all other SOA retailers—specifically incorporates, as part of the Agreement, the terms and provisions of the Subaru Owner Loyalty Program Reference Guide. *See* Dealer Agreement (Exhibit 11) at p. 31; Owner Loyalty Program Reference Guide (Exhibit 26); Tr. Vol. 1 at 165:22-167:1 (Poston).

Moreover, for several years, Bert Ogden has been well aware that the dealership's performance in terms of customer service is materially deficient and non-compliant with the standards required under its Dealer Agreement. In 2015, SOA and Bert Ogden entered into an OLP Performance Addendum for the purpose of addressing Bert Ogden's ongoing failure to provide an adequate level of customer service. *See* OLP Addendum (Exhibit 7); Tr. Vol. 1 at 164:11-168:19 (Poston). Under the terms of said Addendum, Bert Ogden expressly acknowledged that its OLP

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scores of 738 for purchase satisfaction and 799 for service satisfaction were deficient and constituted "***a material breach***" of the minimum standards for customer service under the Dealer Agreement. *See* OLP Addendum (Exhibit 7) at p. 1 (emphasis added); Tr. Vol. 8 at 2124:24-2125:21 (Vackar). Pursuant to the OLP Performance Addendum, Bert Ogden agreed that by the end of 2016, it would improve its purchase and service experience satisfaction scores to meet the Central Region average scores, which were 911 for purchase satisfaction and 878 for service satisfaction. *See* OLP Addendum (Exhibit 7) at p. 1. Bert Ogden further agreed that its failure to maintain its purchase and service satisfaction scores at or above the regional average would constitute a "material breach" of its Dealer Agreement. *Id.*

Based on the clear and unambiguous terms of the OLP Performance Addendum, Bert Ogden has understood that its OLP scores in the last few years for purchase and service satisfaction—which were well below the DFW Zone average—were not compliant with the minimum standards for customer service required under its Dealer Agreement. In fact, on a number of occasions, SOA warned Bert Ogden that, based on its OLP scores, the dealership was out of compliance with its customer satisfaction obligations. *See e.g.* February 14, 2020 Letter re: OLP Performance (Exhibit 125); Tr. Vol. 2 at 343:6-345:19 (Adams).

2. Comparative Retailer OLP Ranking is an Appropriate and Reasonable Component of SOA's OLP System and Viewing a Retailer's OLP Scores in Isolation Would Not Serve the Goals of the OLP System.

As set forth in its Exceptions and Post-Hearing Briefing, Bert Ogden continues to take issue with the fact that SOA focuses on retailer rankings in connection with its assessment of customer satisfaction. *See e.g.* Exceptions at p. 6, 18, and 22-24; Protestant's Post-Hearing Brief at p. 3. Bert Ogden contends that because its customer ratings are purportedly "closest to extraordinary," the fact that Bert Ogden's OLP scores are consistently among the lowest in the

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Zone (if not the Nation) is immaterial to the evaluation of customer satisfaction with the purchase and service experiences at its dealership. *Id.* at p. 3 and 47. This is simply not the case.

Retailer OLP rankings are an important part of SOA's OLP system because the rankings place an individual retailer's customer satisfaction scores in context and allow SOA to identify the retailers with which customers are the least satisfied. Tr. Vol. 3 at 761:3-18 and 776:17-777:24 (Dubinsky). A retailer, such as Bert Ogden, that consistently ranks at or very near the bottom of all retailers in its Zone indicates that the retailer has some significant and unresolved issues with respect to the purchase and/or service experience it is offering its customers. *Id*. at 806:20-808:8. As the ALJs accurately explained in the PFD, "SOA has used OLP comparative rankings since at least 1998." *See* PFD at p. 52. "Bert Ogden's disagreement with SOA's method of using comparative rankings…is not a reason to discount it as a useful instrument for identifying the lowest performing retailers so that SOA can help those retailers improve the customer service experience. This is a legitimate goal of the OLP program, and one that would not be served by review of a dealer's scores in isolation." *Id*.

Moreover, it is important to note that Bert Ogden's overall purchase and service satisfaction scores have continuously been not just below, but ***well below*** the average scores for Subaru retailers in the DFW Zone. *See* Lytle Report (Exhibit 186) at p. 55; 2017 Q4 OLP Report (Exhibit 51) at p. 18; 2018 Q4 OLP Report (Exhibit 52) at p. 22; 2019 Q4 OLP Report (Exhibit 53) at p. 24; 2020 Q4 OLP Report (Exhibit 54) at p. 24; 2021 Q3 OLP Report (Exhibit 55) at p. 19; Tr. Vol. 5 at 1369:4-1370:18 (Lytle). By way of example and without limitation, as of December 2019, Bert Ogden's purchase satisfaction score was 772 compared to the DFW Zone average score of 881, and, as of September 2021, Bert Ogden's purchase satisfaction score was 784 compared to the Zone average score of 904. *See* 2019 Q4 OLP Report (Exhibit 53) at p. 24;

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and 2021 Q3 OLP Report (Exhibit 55) at p. 19. Likewise, with respect to service satisfaction, as of June 2020, Bert Ogden's satisfaction score was 736 compared to the Zone average of 843, and as of September 2021, Bert Ogden's service satisfaction score was 765 compared to the Zone average of 825. *See* 2020 Q4 OLP Report (Exhibit 54) at p. 44; and 2021 Q3 OLP Report (Exhibit 55) at p. 45. For reference, a chart detailing Bert Ogden's December 2016 through September 2021 OLP performance is provided below. Unlike the chart on page 18 of Bert Ogden's Exceptions, the chart below includes Zone average OLP scores as well as Bert Ogden's OLP rankings, both of which provide critical context for Bert Ogden's individual OLP scores.

	Protestant's OLP Purchase Score	**Zone Average OLP Purchase Score**	**Protestant's OLP Purchase Ranking**	**Protestant's OLP Service Score**	**Zone Average OLP Service Score**	**Protestant's OLP Service Ranking**
Q4 2016[17]	934	935	**22 of 39**	840	910	**38 of 39**
Q4 2017[18]	853	938	**42 of 42**	962	926	**2 of 42**
Q4 2018[19]	786	858	**40 of 43**	822	817	**22 of 43**
Q4 2019[20]	772	881	**43 of 45**	805	831	**33 of 45**
Q4 2020[21]	831	897	**44 of 44**	795	843	**43 of 44**
Q3 2021[22]	784	904	**44 of 44**	765	825	**40 of 44**

[17] *See* 2016 Q4 OLP Report (Exhibit 50).

[18] *See* 2017 Q4 OLP Report (Exhibit 51).

[19] *See* 2018 Q4 OLP Report (Exhibit 52).

[20] *See* 2019 Q4 OLP Report (Exhibit 53); Lytle Report (Exhibit 186) at p. 55-56.

[21] *See* 2020 Q4 OLP Report (Exhibit 54); Lytle Report (Exhibit 186) at p. 55-56.

[22] *See* 2021 Q3 OLP Report (Exhibit 55).

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Given that Bert Ogden's OLP scores are considerably lower than the DFW Zone average and the dealership ranks among the worst performers in the Zone in terms of customer satisfaction, this is not a situation in which Bert Ogden's customer service performance is merely slightly below the performance of other retailers. To the contrary, Protestant's OLP scores are materially deficient and there are serious customer dissatisfaction issues with specific aspects of the Subaru experience at the dealership. As the ALJs correctly concluded in the PFD, "SOA's use of comparative rankings is not a recent development, and Bert Ogden should not be surprised that their consistently low rankings would eventually have some consequence… SOA's use of comparative rankings is appropriate and reasonable, and Bert Ogden's consistently low rankings demonstrate that termination of the dealership agreement would benefit the public." *See* PFD at p. 52-53.

3. SOA Has Not Abandoned OLP as a Measure of Customer Satisfaction.

In both its Exceptions and its post-hearing briefing, Bert Ogden has attempted to insinuate that, as of January 1, 2022, SOA had fully abandoned its OLP system. *See e.g*. Exceptions at p. 22-24; Protestant's Post-Hearing Brief at p. 5 and 46-47. As SOA's National Owner Loyalty Manager, George Dubinsky, testified, "there could be nothing further from the truth." Tr. Vol. 3 at 771:20-772:9 (Dubinsky). The only change that SOA implemented regarding OLP was its elimination of the overall satisfaction component of the OLP customer survey, and the remaining components of the OLP system remain in place. *Id*. at 771:20-773:13.

Importantly, Bert Ogden has provided no support for its contention that SOA's method of evaluating customer satisfaction should be disregarded as unreliable because SOA recently changed one of the survey questions in the OLP customer questionnaire. Indeed, the former inclusion of overall purchase and service satisfaction scores in SOA's OLP system does not in any way render SOA's method of measuring customer satisfaction invalid. There is nothing inherently

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wrong or unreliable with the overall purchase and service satisfaction component of OLP, and Bert Ogden has not identified any specific problem with this component other than the fact that it is no longer included in customer surveys and retailer OLP reports as of January 1, 2022. *See* Exceptions at p. 22-24; Protestant's Brief at p. 5 and 46-47. Contrary to Bert Ogden's unsubstantiated claims, overall satisfaction scores constituted a valid part of SOA's OLP system for over two decades, and this metric is widely used throughout the automotive industry. Tr. Vol. 3 at 773:5-13 and 829:16-23 (Dubinsky); Tr. Vol. 1369:4-17 (Lytle). SOA's recent discontinuation of the overall satisfaction component of OLP does not in any way mean that this metric is or was unreliable. Tr. Vol. 3 at 771:20-773:13 (Dubinsky). SOA simply decided to reconfigure its OLP surveys by removing the overall satisfaction component—the rest of the OLP survey remains unchanged. *Id*.

Moreover, the overall purchase and service satisfaction scores were just one component of SOA's OLP system, which also includes a Key Satisfaction Indicator ("KSI") section, and a Net Promoter Score ("NPS") section. Tr. Vol. 3 at 756:15-765:11 (Dubinsky). Notably, Bert Ogden has performed poorly with respect to ***all three components of OLP***. *See e.g*. 2018 Q4 OLP Report (Exhibit 52) at p. 22-27; 2019 Q4 OLP Report (Exhibit 53) at p. 23-25; and 2021 Q3 OLP Report (Exhibit 55) at p. 15-20; Tr. Vol. 3 at 1214:21-1215:2 (Delapp). The KSI section also provides insight into the specific reasons for customer dissatisfaction with the purchase and service experiences at Bert Ogden Subaru, which serves to substantiate the reliability of Bert Ogden's substandard overall satisfaction scores. *Id*.; Tr. Vol. 3 at 756:15-757:13 (Dubinsky). As set forth in the PFD, the ALJs found the evidence of Bert Ogden's "consistently low OLP rankings" to be "most persuasive" and based on the OLP evidence presented during the hearing[23], the ALJs

[23] In an attempt to distract from the overwhelming evidence of customer dissatisfaction with the purchase and service experience at Bert Ogden Subaru, Protestant has claimed that SOA unfairly presented evidence of only negative customer comments from the dealership's OLP customer surveys. *See* Exceptions at p. 25. This contention deserves

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correctly concluded that "the Rio Grande Valley is being served by a Subaru dealership that, its customers say, provides a below-average customer service experience. *See* PFD at p. 51 and 53.

E. SOA's Establishment of a Replacement Retailer and Impact on Consumers

Protestant also challenges the PFD's conclusion that the termination of Bert Ogden and installation of a more effective replacement dealer in this market will benefit the public. Notably, Protestant does not challenge Finding of Fact 64, which concludes that SOA intends to install a new dealer quickly and that "any inconvenience will be brief and is outweighed by the benefit the public will realize once a new dealer is established." Instead, Protestant claims that the PFD does not sufficiently address how long customers may be without sales or service representation in the market, and simply accepts SOA's evidence that it will replace the dealer quickly. Protestant further claims that the "most reliable" evidence on this issue was from its own witnesses about their experience opening other franchises for other brands under completely different circumstances. *See* Exceptions at p. 52-53.

These allegations, however, ignore the wealth of evidence introduced by SOA's witnesses about the establishment of a replacement dealer in this very instance. As presented at the hearing, SOA has already been contacted by two existing retailers who operate Subaru dealerships in Austin and San Antonio about opening a replacement dealership in the Valley. Tr. Vol. 2 at 417:7-418:14 (Adams). Although Bert Ogden suggests it could take months or years to construct and staff a new dealership in this market, both of those interested parties already have existing dealership facilities and existing dealership employees in the Valley. *Id.* Given these facts, multiple SOA witnesses

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a response only to clarify that Bert Ogden and SOA have equal access to customer comments contained in Bert Ogden's customer surveys regardless of whether those comments are positive or negative. Tr. Vol. 3 at 784:7-786:4 (Dubinsky). Moreover, during the hearing, Bert Ogden had every opportunity to present evidence of customer comments that it deemed to be "positive," and Bert Ogden did, in fact, present such evidence. *See e.g.* Tr. Vol. 7 at 1878:19-1881:14 (Mauldin); Tr. Vol. 3 at 813:6-818:14 (Dubinsky).

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testified that it could have a replacement retailer up and running, at least in temporary facilities, relatively quickly and in a matter of weeks. *Id*. at 418:15-420:2; Tr. Vol. 1 at 178:3-179:3; 253:15-255:4 (Poston). SOA also presented evidence from the Texas DMV that a new retailer's license application could be completed in 7-10 days. Tr. Vol. 2 at 418:15-420:2 (Adams).

Accordingly, there is no support for Bert Ogden's conclusory suggestion that it could take months or years to establish a replacement dealer in this market. Instead, given the material issues with Bert Ogden's performance and operations discussed above, the evidence strongly supports the PFD's finding that any short-lived inconvenience to customers would be far outweighed by the long-term benefits provided by a new and more effective retailer in this market.

IV. CONCLUSION

Protestant's Exceptions request a complete reversal of the ALJs' findings and legal conclusions set forth in the PFD that good cause exists for the termination of Protestant's Subaru Dealer Agreement. Protestant is seeking this reversal without acknowledging the pertinent facts and applicable law that undeniably support the good-cause determination. Moreover, Protestant has not established that the ALJs came to any factual or legal conclusion that is unsupported by the record. For the reasons set forth above, SOA respectfully requests that the ALJs deny each and every exception that Protestant has raised and affirm the findings and conclusions in the PFD.

Dated this 18th day of August, 2022.

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CERTIFICATE OF SERVICE

The undersigned certifies that a copy of this document was served upon the following this 18th day of August, 2022 in accordance with TEX. R. CIV. P. 21a:

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EXHIBIT A

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NEW YORK STATE | Department of Motor Vehicles

DEBORAH V. DUGAN
Chairman

APPEALS BOARD
P.O. BOX 2935 • EMPIRE STATE PLAZA • ALBANY, NY 12220-0935

June 14, 2016

GENERAL MOTORS LLC
DANIEL ADAMCHECK
39 OLD RIDGE ROAD, SUITE 1
DANBURY, CT 06810

Re: NOTICE OF APPEAL DECISION
Appeal Docket No.: 34452
Case No.: FMD201302A

Dear Appellant:

The above-referenced Administrative Appeal was decided by the Appeals Board on the date indicated on the enclosed Decision of Appeal, pursuant to Article 3-A of the Vehicle and Traffic Law.

This is a final, administrative determination of the Department. Any further appeal of an adverse decision should be made to the New York State Supreme Court pursuant to Article 78 of the Civil Practice Law and Rules.

Very truly yours,

APPEALS BOARD
PROCESSING UNIT

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NYS DEPARTMENT OF MOTOR VEHICLES
ADMINISTRATIVE APPEALS BOARD
DECISION OF APPEAL

GENERAL MOTORS LLC
C/O DANIEL ADAMCHECK
39 OLD RIDGE ROAD, SUITE 1
DANBURY, CT 06810
FRANCHISE MOTOR VEHICLE DEALER - CASE NO.: FMD2013-02

DOCKET NO.: 34452
DECIDED BY BOARD: MAY 31, 2016

Pursuant to Vehicle and Traffic Law (VTL) §471-a of the Franchised Motor Vehicle Dealer Act (Article 17-A of the Vehicle and Traffic Law), Beck Chevrolet Co., Inc. (Beck), a franchised motor vehicle dealer located in Yonkers, New York, filed a Request for Adjudicatory Proceeding with the Department of Motor Vehicles seeking review of a Notice of Non-Renewal of Dealer Sales and Service Agreement by General Motors LLC (GM), the franchisor and appellant. After a hearing, the Administrative Law Judge prohibited the termination pursuant to reasons stated in GM's termination letter of June 11, 2013, because GM failed to establish due cause to terminate Beck's franchise. GM now appeals the Administrative Law Judge's determination.

A transcript was submitted and reviewed.

PRESERVED ARGUMENTS

1. The Administrative Law Judge erred in concluding that, under VTL §463(2)(d)(1), GM's non-renewal notice relied solely on Beck's failure to meet its Retail Sales Index (RSI) requirements, because the notice specifically cites various considerations on which GM relied in addition to Beck's unsatisfactory RSI scores, GM presented substantial evidence at the hearing that it relied on these other considerations, and the evidence collectively established that GM had due cause not to renew Beck's dealer agreement.

2. The DMV erred as a matter of law in refusing to recognize the collateral estoppel effect in this proceeding of an earlier ruling by the United States District Court for the Southern District of New York, which held that GM's RSI does not constitute "an unreasonable, arbitrary or unfair sales or other performance standard in determining a franchised motor vehicle dealer's compliance with a franchise agreement" under Section 463(2)(gg) of the VTL.

3. The Administrative Law Judge's Decision is not supported by substantial evidence where it is undisputed that Beck breached its commitments under the Dealer Agreement and Participation Agreement, GM's performance standard was previously held to be fair and reasonable after a plenary trial, and Beck failed to cure its performance within a reasonable time after GM's notice of default.

PROCEDURAL HISTORY

Beck filed a Request for Adjudicatory Proceeding pursuant to Article 17-A of the Vehicle and Traffic Law, seeking to challenge the termination of its Motor Vehicle Franchise Agreement by GM. Beck sought a determination prohibiting GM from terminating Beck's franchise because GM lacked due cause and did not act in good faith. Pursuant to VTL §471-a(3), GM requested a resolution of the dispute without a hearing. VTL §471-a(3) specifies that such requests are only to be granted

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where no unresolved material issue of fact is presented in the matter. The Administrative Law Judge, after consideration of the presented papers, issued a determination without a hearing and recognized the collateral estoppel effect of a decision issued by the Federal District Court regarding an action that had been filed prior to the issuance by GM of the Notice of Non-Renewal of Beck's franchise agreement. (The Federal District Court found that the use by GM of a New York Statewide standard to assess Beck, an exclusively downstate dealership, to be reasonable.) The Administrative Law Judge found that Beck's failure to reach the established sales scores was a material breach of the contract and that Beck was provided a reasonable opportunity to cure the defect. The Administrative Law Judge also concluded that there was no evidence that GM acted in bad faith in seeking termination of the franchise agreement.

Beck appealed the original determination of the Administrative Law Judge issued without a hearing to the Administrative Appeals Board. The Administrative Appeals Board reversed and remanded, finding that the issuance of a determination without a hearing was not proper as there were unresolved material issues of fact presented. In particular, the Appeals Board found that the determination by the Federal Court was not binding in the Department's administrative adjudication and that the Administrative Law Judge had failed to address whether or not factors beyond Beck's control were the cause of Beck's failure to achieve the required sales index.

Upon remand and after a full hearing, the Administrative Law Judge found in Beck's favor, concluding that the use of a statewide sales standard to assess the performance of a dealer in the downstate area of New York was not reasonable. In particular, the Administrative Law Judge found that, for "the New York City metropolitan area, the RSI standard of GM is unreasonable as it does not realistically reflect the Chevrolet sales challenges that Beck and other New York metropolitan dealers face, and GM is not applying the RSI uniformly to all dealers in New York..." "GM's method of determining the RSI as applied for metropolitan NYC is unreasonable and the performance of Beck otherwise materially meets the standards of GM; therefore, GM lacks due cause to terminate Beck's franchise." The Administrative Law Judge further found that, contrary to the assertions of GM, GM had not established any other reason for the termination of the franchise agreement other than Beck's failure to meet the Retail Sales Index.

GM now appeals the most recent determination of the Administrative Law Judge.

UNDISPUTED FACTS

The primary subject matter of this proceeding is GM's proposed termination of a Dealer Sales and Service Agreement and a 2009 supplemental Participation Agreement. These contracts were entered into as part of a bankruptcy reorganization effort by GM and superseded any previous franchise agreements between the parties and GM's predecessor-in-interest. During the predecessor's bankruptcy proceeding, Beck entered a wind-down agreement to terminate its franchise in exchange for a money payout. After GM acquired certain assets of the predecessor, GM agreed to rescind Beck's wind-down agreement and issued Beck a Participation Agreement. The Participation Agreement in conjunction with Beck's Dealer Sales and Services Agreement allowed Beck to operate as a GM franchise operation. Pursuant to Article 9 of the Dealer Sales and Service Agreement, Beck would be subject to periodic review of its sales performance and would be required to achieve a Retail Sales Index (RSI) score of 100 or greater. These performance standards were modified by the Participation Agreement in Paragraph 9, wherein Beck was required to achieve RSI scores of 70 for 2010, 85 for 2011, and 100 for 2012.

Beck failed to achieve the RSI scores required by the agreements. Beck's yearly score for 2010 was 50.1, 50.9 for 2011, and 50.6 for 2012. Beck was provided a yearly sales performance report by GM, detailing the score for the preceding year. On June 8, 2012, GM issued Beck a Notice of Breach

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of GM's Dealer Sales and Service Agreement and Participation Agreement, citing Beck's failure to reach the required RSI scores as a breach of the contract and providing a cure period through May 31, 2013. Beck's RSI scores did not improve to the required levels. On June 11, 2013, GM issued Beck a Notice of Nonrenewal of Dealer Sales and Service Agreement which indicated that GM was terminating its Participation Agreement because Beck's "RSI for calendar 2011 was only 50.9, which constituted a breach" of both the Dealer Sales and Service Agreement and Participation Agreement.

The RSI is a fraction, expressed as a percentage, where the numerator is a dealer's actual sales and the denominator is a dealer's expected sales. Expected sales are determined by applying the Chevrolet brand's state market share, in each vehicle segment where Chevrolet competes, to the competitive vehicles registered in the dealer's assigned market area.

Beck does not deny that it failed to reach the RSI scores contained in the Agreement. Rather, Beck contends that the use of a statewide standard in calculating the scores is not appropriate or reasonable as the market for the Chevrolet brand in downstate New York is dramatically different from the market in the remainder of the state. Beck further contends that the failure to achieve the required scores was due to factors beyond its control.

LITIGATION HISTORY

Beck filed an action against GM, the franchisor, in state Supreme Court for claims arising under the Franchised Motor Vehicle Dealer Act. GM removed the action to the United States District Court for the Southern District of New York (Federal District Court). Beck filed a second amended complaint asserting claims for injunctive and declaratory relief under the Franchised Motor Vehicle Dealer Act, including a claim alleging that GM used an unreasonable, arbitrary and unfair performance standard, pursuant to VTL §463(2)(gg). After a bench trial, the Federal District Court held against Beck, and Beck appealed. The U.S. Court of Appeals for the Second Circuit (Federal Court of Appeals) determined that resolution of the appeal depended upon unsettled New York law and certified a question of law to the New York Court of Appeals regarding whether a performance standard requiring average performance based on statewide sales data in order for a dealer to retain its dealership was unreasonable, arbitrary, or unfair under VTL §463(2)(gg) because it does not account for local variations beyond adjusting for the local popularity of general vehicle types.

TESTIMONY/EVIDENCE

Hearing dates: 9/22/14, 9/23/14, 9/24/14

The GM Manager of Dealer Network Planning Analysis, Alvon Giguere, testified that, as part of its 2009 bankruptcy, GM needed to restructure the dealer network and eliminate some dealerships. (Transcript 39) As part of this restructuring, Westchester County was cut from eight Chevrolet dealers to four. (Transcript 40) Beck was originally one of the dealers to be "wound down" and removed from the network. Beck would have then been replaced by a "backfill." (Transcript 41) After a series of negotiations, GM ultimately agreed to let Beck remain. (Transcript 41) In addition to the usual dealer agreement, Beck was also assigned an escalating sales standard as part of a Participation Agreement. (Transcript 42-43)

The sales standard used to judge dealers by GM is the Retail Sales Index (RSI). (Transcript 11) The RSI is a mathematical calculation that takes the dealer's actual retail sales divided by "dealer opportunities," using the expected sales based on a segment adjusted state average (market penetration) and multiplied by 100 to convert the number into an index. (Transcript 12-13) GM looks at individual products that GM offers and at the state average penetration for that product

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within the competitive group of the segment. GM uses its statewide market share multiplied by the vehicle registrations in the dealer's assigned territory (commonly referred to as its AGSSA – area of geographic sales and service advantage) to calculate "dealer opportunities." (Transcript 12-13, 17, 22) The witness believed that the segment adjustment process takes into account many of the economic and demographic differences from market to market. (Transcript 28-29) The witness acknowledged that, given the differences in markets between upstate and downstate, the New York Dealers Association had raised concerns that a statewide market share standard was not appropriate for downstate dealers. (Transcript 27-28) The witness believed that the use of a statewide standard for calculating the RSI was reasonable. (Transcript 44)

As part of the new Participation Agreement, Beck was required to achieve an escalating sales standard. In 2010, Beck would be required to achieve an RSI of 70. In 2011, Beck would be required to achieve an RSI of 85. In 2012, Beck would be required to achieve an RSI of 100. (Transcript 43) An RSI of 100 represents an average dealer within the state, and is generally the required sales effectiveness for a dealer. (Transcript 12-13) Beck failed to meet the required standard in each of the years.

On cross examination, the witness acknowledged that, as the RSI of 100 represents an average dealer, approximately half of the GM dealers in the state do not satisfy the sales requirement each year and that it was fairly typical for a significant number of dealers to a achieve an RSI score below 100. (Transcript 85-86) The witness further acknowledged that, as a general trend, upstate dealers perform better than downstate dealers. (Transcript 82) Further, when compared to the other downstate dealerships, Beck's sales performance was "approximately in the middle." In fact, only four of the 23 downstate dealerships met an RSI of 100. (Transcript 90) Beck's total sales did improve during the timeframe of the Participation Agreement, from 218 vehicles in 2009, to 417 vehicles in 2013, a 93 percent increase. (Transcript 92-94) The witness further acknowledged that if the RSI were calculated using a New York metropolitan area standard as opposed to a statewide standard, Beck's RSI would approximately double. (Transcript 101)

The GM Northeast Regional Director for Sales, Service and Marketing, Daniel Adamcheck, testified that he was directly involved in the decision not to renew Beck's franchise. (Transcript 121) "The dealership is located in a very strong area we believe is good for Chevrolet and good for the dealership in that market. The dealership, from a physical standpoint, is one that has let time kind of slip by, and has not been kept up over time, has somewhat deteriorated quicker than the market around it had." (Transcript 124) During the bankruptcy reorganization, Beck had initially accepted an offer to wind down. (Transcript 125-126) Eventually, Beck indicated a desire to continue in business. Ultimately, there was an "influx of senators and congressman asking General Motors" to "look at things closer" regarding dealerships that were being wound down. There was also an "unbelievable persistence" from the management of Beck, indicating that they were going to improve operations going forward. (Transcript 129-130) Beck did not raise any complaints regarding the RSI calculation formula prior to signing the Participation Agreement. However, after signing, Beck became "very adversarial." The witness further explained, "...every request, every question was challenged and we went back and forth on every single issue." (Transcript 142-143, 145)

The witness acknowledged that the primary reason for termination of Beck was its failure to meet the RSI requirements. However, another reason for termination was that Beck had not put forth sufficient effort to improve its operations. (Transcript 173, 176)

GM provided dealerships in Beck's position several programs to help them improve sales, including the Dealer Performance Agreement Program (DPAP), the Essential Brand Element (EBE), and the Supplemental Facilities Improvement Program (SFIP). One of the programs offered as part of the

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Essential Brand Element project allowed dealerships to receive money to be used towards upgrading facilities, marketing and training. (Transcript 160-164) The funds were earned by the dealership through the purchase from GM of additional inventory that was available beyond the normal allotment procedure. Product was in short supply at the time. (Transcript 153-154) The witness noted that Beck did not order all of the vehicles made available to it through this program. (Transcript 158-159) Beck never completed the facility upgrades it agreed to upon its participation in these programs (Transcript 179-195), never shared any marketing or business plans with GM (Transcript 212-213), and never prepared the GM prescribed business plan. (Transcript 147-151) As of the time of the hearing, Beck had received $882,000 in EBE funds and had not performed the required facility image upgrades. (Transcript 207)

The witness noted that other downstate dealers had made operational changes which had resulted in improved sales. The witness did not believe that GM's market penetration prevented sales improvements from occurring. GM's lack of leasing programs did not impede dealerships from improving sales. Further, while imports did offer leasing arrangements, these were regarded as an alternate to traditional sales due to the "credit crunch" which was going on at the time. (Transcript 271-280)

On cross examination, the witness acknowledged that GM had extended the deadline for Beck to complete the renovations until April 30, 2014, which was after the Notice of Termination was issued. The witness further acknowledged that the EBE money was earned by the dealership for accepting the additional allocation of vehicles. Beck had to pay GM for these vehicles. (Transcript 331-332) Mr. Adamcheck thought it was reasonable for GM to allow Beck to continue with the EBE facilities upgrade program despite the breach notice. (Transcript 338) The witness also indicated that there had never been a problem with Beck meeting its customer satisfaction or capitalization requirements under the Participation Agreement (Transcript 339-340)

The witness further stated that when GM got out of the leasing market, it "did create a void in the market," (Transcript 343) because of the loss of a portfolio of people who wanted to lease and were creditworthy and could go to some of the other manufacturers that were leasing at the time. (Transcript 344-345) The dealers had no control over the decision to cease the leasing programs, but had to deal with the repercussions of that decision. (Transcript 346) The witness further acknowledged that there were several downstate dealerships that had RSI levels lower then Beck's, but none of those dealers received a breach notice from GM, and GM did not attempt to terminate the other dealerships. (Transcript 413-416)

A Dealer Network Analysis, Customer Relationship Management and Site Analysis Consultant from Urban Science Applications, Sharif Farhat, was called as a witness on behalf of GM. The witness testified that he performed an analysis of the Beck facility, in which he measured the performance of the dealer and then analyzed the likely causes of the performance. (Transcript 447) The witness used sales and registration data to assess how the dealer and brand were performing relative to the general market. (Transcript 449) The primary conclusion of the witness was that Beck did not achieve required sales benchmarks and that its poor performance was not due to factors outside of its control. (Transcript 461)

The witness further concluded that the use of a state average in calculating sales performance was appropriate and reasonable. The use of such a standard is objective and does not change from year to year. All of the dealers involved are subject to the same laws and tax requirements. If the dealer were to use a smaller area, any changes to the smaller area could be subjective. (Transcript 471-472) The witness noted that several downstate dealers were able to reach the required RSI in 2012. (Transcript 485-486) Applying the statewide standard to the calculation of Beck's expected RSI, Beck was expected to sell 662 vehicles in 2012. It actually sold 335 vehicles, resulting in an

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RSI of 50.6 for the year. (Transcript 481) The witness did not believe that the goal for Beck to sell 662 cars was unreasonable. (Transcript 491-492.) The dominant dealership for sales in the Yonkers area, where Beck is located, is Curry Chevrolet, which is located in Scarsdale. This suggests that consumers are rejecting Beck, rather than the Chevy brand. (Transcript 511)

The witness further concluded that Beck's poor performance was caused by its own poor operations. (Transcript 558) The witness visited the facility and found, "it's not a good-looking store." (Transcript 560) The witness reviewed Beck's advertising, and found that the advertising effort was "very low." (Transcript 563-564) The witness noted that Beck showed a significant improvement in the end of 2012, during a period of time in which Beck briefly hired a different sales manager and increased its advertising budget. "I think with additional effort this dealership could improve dramatically. Its own actions show that opportunity is there for improvement. But for whatever reasons, it chose not to do that." (Transcript 492-493)

The witness further concluded that factors beyond Beck's control were not the cause of its poor performance. The witness ran models controlling for territory designation (Transcript 510), Buffalo and Rochester manufacturing bias (GM has manufacturing facilities in the Buffalo/Rochester area which can lead to artificially inflated sales numbers in this area) (Transcript 522), import bias (Transcript 523), and leasing bias (Transcript 534-535). In every instance, Beck's performance remained poor when compared to other facilities. The witness further opined that unemployment, another factor cited by Beck, is, "a very poor indicator for new vehicle demand." (Transcript 548.)

On cross examination, the witness acknowledged that the New York metropolitan media market is the largest in the country, but has the fourth lowest General Motors market share in the country. (Transcript 663-665) The witness further acknowledged that Beck's sales increased from 218 vehicles in 2009 to 417 vehicles in 2013, a 93 per cent increase. (Transcript 677)

Hearing date: 9/29/14 – 9/30/14

On September 30, 2014, a Financial Background Consultant from Urban Science Applications, Herbert Walter, was called as a witness on behalf of GM. The witness had a background in quantitative analysis, accounting and finance, and was qualified as an expert on financial operations of motor vehicle dealerships. (Transcript 215-219) The witness analyzed Beck's operations and finance, reviewing in particular "management decisions of the Beck dealership as it relates to the Participation Agreement, to see if the Beck dealership made changes in its operations and management decisions to implement or to take on the requirements of and changes needed to implement the Participation Agreement." In particular, the witness was looking at sales, advertising, inventory, and use of leverage tools. (Transcript 221)

In performing the analysis, the witness reviewed the Participation Agreement, Beck's financial statements, composite financial statements for other dealerships, inventory and sales records, and other expert reports submitted in conjunction with this matter. (Transcript 223) Based upon this analysis, the witness formed an opinion. "I found that Beck did not make changes in its operations management decisions over time, following the signature on the Participation Agreement, meaning 2010 through 2012." (Transcript 225) The witness found that Beck was not a strong financial performing dealership. Beck had access to funds, inventory, and customers that were sufficient to make additional sales. (Transcript 226)

The witness noted that over the time period in question, Beck was substantially less profitable than other similar dealerships. (Transcript 229-230) From 2010 to 2012, Beck's sales volume did not grow. (Transcript 235) Beck did not change its pricing strategy. (Transcript 251-252) They did not leverage the unencumbered property to obtain finance to improve operations. (Transcript 231)

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Beck reduced its expenditures on advertising. (Transcript 272-273) They lowered the sales force from 6.5 sales people to 5.5 sales people. (Transcript 289-292) Beck did not accept additional inventory allocation which would have allowed additional sales. (Transcript 302-305) Beck spent less on staff training than comparable facilities, and very little on capital improvements to the facility. (Transcript 313, 317) "They didn't really change the pricing on any kind of consistent basis. They didn't change their advertising until you get to late '12 and into '13 there is some changes. They have reduced their sales staff. Their training is below the comparison groups. They don't have the profitability of the other dealerships. They have the availability of additional inventory. So, they have the opportunity, and as you can see with this, working capital." (Transcript 319) On cross-examination, the witness acknowledged that none of the areas of Beck's finances and operations the witness had discussed were the basis for terminating Beck's franchise (Transcript 325).

On September 29, 2014, Russell Geller, the Vice President and General Manager for Beck, testified that Beck had entered into, and agreed to the terms of the post-bankruptcy Participation Agreement. (Transcript 191) Beck did not raise any formal objection to the use of the statewide standard for calculating the RSI prior to entering the Participation Agreement. (Transcript 199) As GM had never before raised any issues with Beck with regard to a low RSI, "...we didn't put much credence to the fact that we weren't hitting 100...There was never anything that was ever done to my dealership as well as hundreds of thousands of other dealerships...Never in my wildest dreams after nine years of not hitting RSI did I ever think that GM would actually enact a termination against me based on this. Their previous behavior never showed me that." (Transcript 199-200) The witness acknowledged that Beck did not achieve the RSI requirements set forth in the Agreement. (Transcript 204-205) The Notice of Breach indicated that the only basis for breach was not obtaining the RSI of 85 for 2011. No other reason for the breach was provided (Transcript 374) The witness did not know why GM singled Beck out for termination based on failing to achieve the performance standard. (Transcript 376) Beck consistently scored better in customer satisfaction, including cleanliness and attractiveness of the facility, overall purchase and delivery experience, and service, than other GM dealers, in its zone, region and entire network, including other GM dealers near Beck who had RSI scores below Beck. (Transcript 379-385)

On September 30, 2014, Russell Geller further testified that he has always thought that GM's expected sales were too high. (Transcript 31) The witness cited to numerous factors beyond Beck's control that contributed to its inability to meet the RSI goals.

The witness noted that under the Participation Agreement, GM was required to provide assistance in creating an action plan to improve sales. GM refused to do so unless Beck provided a written business plan on GM's template through the DART system. The witness noted that under the Participation Agreement, a written business plan was voluntary and not required to trigger GM's obligation. (Transcript 3-4, 8) In 2011, Beck completed all parts of the GM business plan template except the sales forecast section. (Transcript 5-6) Beck did not complete a sales forecast section for GM's business plan because GM inserted a network planning volume (NPV) in the template, which was substantially different from Beck's RSI figure, representing a number between 30-40 per cent higher than the RSI. Beck did not complete the section of the GM template because this would require Beck to submit sales data that would be entered into a calculation formula using NPV figures which would increase the RSI calculation by 30 to 40 percent. (Transcript 7-8) The witness did not know why GM would use a NPV figure which was different in Beck's business plan, if GM required Beck to satisfy the RSI under its Dealer Agreement or Participation Agreement. The witness provided GM with marketing information in an email in 2011 (Transcript 9-10) and completed the sales forecast portion of the business plan to GM for 2012. (Transcript 13) Beck did not receive any feedback from GM regarding the business plans that were submitted. (Transcript

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11, 14-15, 16) Although GM promised in writing to assist Beck to achieve its performance requirements, GM never provided any assistance in Beck's efforts to sell GM cars. (Transcript 18)

In order to properly execute its own business plan, the witness believed Beck needed specific additional vehicle allocations. The witness made a request to his District Manager. "He had led me to believe that if I provided a wish list to him that I would receive some or all of the wish list." (Transcript 12) Beck requested additional allocation of vehicles, including 10 Sonics, 20 Cruses, with a total of 80 vehicles, trucks and cars as a wish list to GM, in addition to the vehicles Beck would normally request. Beck never received the requested vehicles. (Transcript 12-13) Beck was offered additional vehicles through the special allocation program. As part of this program, Beck was offered 200 cars up front. "If I'm selling approximately 30 vehicles a month and the industry standard is to stock a 65 to 75 day supply, and I'm now asked to buy 200 cars upfront, it was a staggering number." (Transcript 20-21) The facility did take 40 of the vehicles, but did not have space for all of those that were offered. (Transcript 24.) This allowed some room for sales growth. (Transcript 27-28) Another special allocation was offered in 2011 and 2012. This program consisted heavily of Malibus and Traverses. "These two car lines were experiencing national double-digit sales losses, and the New York market was exhibiting similar sales losses." (Transcript 37-38) The witness believed that GM was trying to use Beck as a scapegoat. "It was indicative to me that these vehicles could not be wholesaled to other dealers, because they were obviously turning them away. And General Motors looked to me to be the scapegoat to take these vehicles. And I was not going to let that happen." (Transcript 38) The only vehicles Beck did accept from this offer were 20 Equinoxes. (Transcript 39)

The witness testified that, for some time in 2011, GM was manipulating Beck's sales objective numbers on the GM weekly sales sheets that were sent to all dealers. The witness asked a GM representative why every other dealer wasn't receiving the same inflated sales objective figures on the sales sheets as Beck. Without prior notice, Beck was removed from the daily sales report. This led to a lack of trust by both employees inside the facility and throughout the industry. Not being on the sales sheet cast negative aspersions to the dealership and cast doubt if the dealership was actually in business with GM. Beck was the only dealer out of 63 dealers in the New York zone not to appear on the sales sheet for a year and a month. As a result of this, Beck's sales manager left the facility. This action by GM also made hiring new employees difficult. (Transcript 42-49) In February 2012, Beck was put back on the list with high sales objective numbers. In July 2012, Beck's correct sales objectives began appearing on the monthly report again. (Transcript 52)

Beck's sales were also affected by GM exiting the leasing market in 2008. Prior to this, leasing constituted 75 percent of sales for the facility. After GM exited the leasing market in 2008, Beck's percentage dropped down to 46 percent (Transcript 71-72) The witness indicated that his interpretation, as well as other dealers' interpretation, was that GM's RSI standard was a goal, but when the RSI became an application of termination and only towards Beck, it was unreasonable. (Transcript 73)

The witness further noted that Beck increased, not decreased its advertising spending after it entered the Participation Agreement. (Transcript 77) Further, the reduction in salespeople was the result of winding up a co-located Saab dealership, and did not result in a reduction of Chevrolet salespeople. More than half of Beck's sales staff had received the GM Mark of Excellence Award in 2012. (Transcript 78) The witness believed that Beck made appropriate expenditures for staff training. (Transcript 79-81)

The witness testified that GM constantly compared Beck to Major Chevrolet, another local dealership. The witness knew the sales performance of Major Chevrolet to be poor or as poor as everyone else's. Suddenly, Major Chevrolet's sales performance shot from an RSI in the 50's to

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over 100. A contributory factor to Major Chevrolet's increased RSI was that during the time period in question, GM placed a GM financial representative inside of the other dealership, giving them an unfair sales advantage that was afforded to no other dealer. (Transcript 82) Beck asked to be provided the same benefit, but the request was denied. (Transcript 83-84)

Throughout the time in question, Beck took a lower gross profit per vehicle than other dealerships in the area in order to compete. (Transcript 85) Going forward, Beck has a plan which places an emphasis on internet and smart phone advertising, with a projected 12 percent sales growth. (Transcript 104-106)

Hearing date: 10/1/14

The Vice President of the Fontana Group, Ted Stockton, an expert witness in sales performance requirements enforced by automotive manufacturers upon auto dealers, testified that he was hired by Beck as a consultant on sales performance requirements in the automotive dealership industry to analyze the reasonableness of the use of GM's RSI calculations in drawing conclusions about the quality of Beck's sales performance. (Transcript 4-8) The witness concluded that, for multiple reasons, GM's RSI calculations do not provide a reasonable measure of the quality of a dealer's sales efforts. (Transcript 10-11) This is for two principal reasons. First, the RSI is based in part on expected sales within the assigned territory of the dealership. This is not a good practice because most dealerships sell less than 40 percent of their vehicles to consumers within their own territory. (Transcript 10-12) The second problem with the calculation is that the use of a statewide average is based in large part on unfounded assumptions. "This assumption that the State average market share is applicable to all parts, all subsections of the State simply doesn't hold up." (Transcript 13-14) There were factors that from the design of the RSI statistic the witness could tell were not accounted for and had the potential of affecting market share and were certainly outside the control of the dealer. (Transcript 16)

The witness noted that, with respect to the use of a statewide standard, the GM market share in Beck's sales area is "around 50 to 60 percent of the State average." (Transcript 46) The most statistically significant demographic factors affecting market share for automobile dealers are age, education level, and income of the consumers. These demographic issues matter and are outside of the control of the dealership. (Transcript 18-19) The witness noted that Chevrolet market shares are significantly affected by the level of population with a four-year degree, as well as the level of competition. Product segmentation used in calculating the RSI does not account for all of these variables. (Transcript 15) The Chevrolet market share is also very sensitive to leasing. "The higher the lease concentration, the lower Chevrolet's market share." (Transcript 22)

The witness also found that Chevrolet's market was sensitive to the amount of interbrand competition "to a statistically significant degree." (Transcript 24) "Beck's particular market is not particularly favorable in terms of the types of vehicles that consumers purchase. So Beck is on the losing end. All other things being equal, Beck is at a disadvantage. And statewide we show that that turns into a market share deficit." (Transcript 26-27) Further affecting the statewide average are two major manufacturing facilities in the Buffalo area. There are no such facilities in Beck's territory. The presence of such facilities increases sales in the local region for several reasons. First, GM provides discounts to employees and family members from the facility. Second, there is a perceived self-interest of consumers who live near the manufacturing facility regarding the local community and economy. (Transcript 44-45)

The witness further explained that the GM assigned territories do not accurately reflect local consumer opinions regarding convenience. "If we had a consumer driven or a market behavior driven dealer area, it would not match well to the GM AGSSA (territory assignments)." (Transcript

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33-36.) The witness studied the general consumer patterns outside of the automotive industry in this region, and found, "they prefer to shop to the north, they prefer to shop around New Rochelle, and they tend to leave the area around Beck for their normal shopping." (Transcript 31)

The witness applied an "R squared" analysis to the data. The witness explained that what the data is "... resoundingly telling us is that the decision to incorporate upstate New York in the analysis is not just unreliable, it deletes from any reliability that we would see there... It means that you have two separately performing, separately concentrated, separately oriented markets." (Transcript 39-40)

Hearing date: 10/2/14

The President of the Fontana Group, Joseph Roesner, testified that he was hired by Beck as a sales performance consultant. The witness reviewed the data and analyzed Beck's performance and concluded that the sales performance requirements imposed by GM on Beck are not reasonable. (Transcript 8-9) The witness noted that at any point in time, 50 percent of the total dealer body for Chevrolet is below the 100 RSI requirement and could be subject to termination. The witness determined that, in New York, there are "... identifiable differences between two portions of the state that would be the downstate area and the upstate area." Only one market in the New York metropolitan area was able to meet the RSI calculated using a state average in either 2011 or 2012. (Transcript 9) There are factors that cause fluctuations in the RSI calculation that are outside of a dealer's control, including the market share of the Chevrolet brand, overall industry performance, and unusual factors that may apply to other dealers in the state. (Transcript 10)

Considering the significant, identifiable differences between the downstate and upstate, "the state standard is not an appropriate benchmark, particularly for purposes of termination." (Transcript 10) The witness explained that 83 percent of Chevrolet dealers are located upstate. (Transcript 11) The overall Chevrolet market share for the state of New York is 12.24 percent. However, the Chevrolet market share for the nine downstate counties of New York is only 6.3 percent, compared with a market share of 18.4 percent for the upstate counties. (Transcript 13, 16) "So you can see that the registration effectiveness in the nine downstate counties is less than half of what it is for the balance of New York." This obviously indicates, "... differences in these two areas downstate versus upstate as to the acceptance of the Chevrolet product." These differences are caused by several factors, including the presence of General Motors manufacturing plants in Buffalo and Rochester, and the representation discrepancies for import brands in upstate New York versus downstate New York. (Transcript 17-18)

If the RSI calculation is controlled for the Buffalo and Rochester area bias, the RSI for Beck increases from 60.3 to 70.2 during the period of July through December 2012, which constituted the provided cure period. Controlling for import bias causes the RSI to increase from 60.3 to 91.1. If both factors are controlled for simultaneously, the RSI goes to 98.92. (Transcript 24-26)

The witness recalculated the RSI for Beck using the Chevrolet market share of the nine downstate New York counties. Under this calculation, Beck had an RSI of 92.04 for 2011, 86.12 for 2012, and 98.92 for the cure period. (Transcript 28-29) Beck's sales fell in the middle when compared to the other dealerships in GM's own defined "New York City zone." (Transcript 29-32)

The witness explained that GM adjusts the RSI for segment, breaking the auto industry into segments based upon usage and size, (grouping together pick-up trucks, small, medium and luxury SUVs, sedans, etc.) with no additional adjustments. The RSI calculation does not account for all of the demographic, socioeconomic, factories, or representation issues that exist in one area versus another. (Transcript 42)

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ANALYSIS AND DISCUSSION

The determination should be affirmed. The testimony and evidence presented at the hearing was sufficient to support the findings of the Administrative Law Judge.

VTL §463(2)(d)(1) provides in pertinent part that it shall be unlawful for any franchisor to terminate, cancel or refuse to renew the franchise of any franchised motor vehicle dealer except for due cause, regardless of the terms of the franchise.

VTL §463(2)(e)(1) provides in pertinent part that any franchised motor vehicle dealer who receives a written notice of termination may have a review of the threatened termination by requesting an adjudicatory proceeding, as provided in VTL §§469 and 471-a.

VTL §463(2)(e)(2) provides that the issues to be determined in a review of a termination

> "are whether the franchisor's notice of termination was issued with due cause and in good faith. The burden of proof shall be upon the franchisor to prove that due cause and good faith exist. The franchisor shall also have the burden of proving that all portions of its current or proposed sales and service requirements for the protesting franchised new motor vehicle dealer are reasonable. The determination of due cause shall be that there exists a material breach by a new motor vehicle dealer of a reasonable and necessary provision of a franchise if the breach is not cured within a reasonable time after written notice of the breach has been received from the manufacturer or distributor."

VTL §463(2)(e)(3) provides in pertinent part that the franchisor shall provide notification in writing to the dealer that the dealer has 180 days to correct dealer sales and service performance deficiencies or breaches and that the franchise is subject to termination if the dealer does not correct those deficiencies or breaches. If the termination is based upon performance of the dealer in sales and service then there shall be no due cause if the dealer substantially complies with the reasonable performance provisions of the franchise during such cure period, and, no due cause if the failure to demonstrate such substantial compliance was due to factors which were beyond the control of such dealer.

VTL §463(2)(gg) provides that it shall be unlawful for any franchisor, notwithstanding the terms of any franchise contract, to "use an unreasonable, arbitrary or unfair sales or other performance standard in determining a franchised motor vehicle dealer's compliance with a franchise agreement."

The appellant, GM, contends that the Administrative Law Judge committed error in determining that GM's Non-Renewal Notice relied solely on Beck's failure to meet its Retail Sales Index requirements. Pursuant to VTL §463(e)(3), prior to issuing the Notice of Non-Renewal of Dealer Sales and Service Agreement, GM, the franchisor, was required to provide a notification in writing to the dealer that the dealer had 180 days to correct any dealer sales and service performance deficiencies or other breaches. Thus, the Notice of Non-renewal of Dealer Sales and Service Agreement dated June 11, 2013 must be read in conjunction with the June 8, 2012 Notice of Breach of GM Dealer Sales and Service Agreement and Participation Agreement, which preceded it. The sole basis of breach cited in the initial Notice of Breach was Beck's failure to meet the required retail sales performance. The Notice of Breach stated that "GM is providing this notice to Dealer that Dealer has failed to meet its performance obligations with respect to sales and is in material breach of the Dealer Agreement." Within the subsequent Notice of Non-Renewal, GM refers to operational deficiencies necessary to meet Beck's sales improvement obligations. However, these alleged deficiencies were not part of the original Notice of Breach.

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Moreover, the operational deficiencies cited by GM in the Notice of Non-Renewal are all disputed by Beck, raising an issue of credibility, which the Administrative Law Judge was in the best position to address, having seen and heard the witnesses. In concluding that Beck did not perform poorly with respect to the operational requirements of the Participation Agreement, the Administrative Law Judge mentions numerous factors, including Beck's high Consumer Satisfaction Index scores, Beck's high level of working capital exceeding GM requirements by 30 percent, Beck's out performance of other dealerships in district, zone, and regional training standards, Beck's new car advertising, which exceeded district, zone, and regional averages, and Beck's average gross profit per vehicle, which was below the district and zone averages, indicating that Beck vehicles were not priced too high. The Administrative Law Judge noted that Beck's personnel had received commendations and awards from GM. Further, while GM had expressed concerns regarding the appearance of the facility, the Administrative Law Judge indicates that the photos of Beck's facility which were submitted by Beck are in "marked contrast" to those that were submitted by GM. Therefore, the Administrative Law Judge committed no error.

Beck appealed the determination of the Federal District Court that GM's performance metrics were not unfair or unreasonable. The U.S. Court of Appeals for the Second Circuit (Federal Court of Appeals) certified to the New York Court of Appeals the question of whether a franchisor's sales performance standard that uses "average" performance based on statewide sales data in order to determine a dealer's compliance with a franchise agreement was "unreasonable, arbitrary, or unfair" under VTL §263(2)(gg) because it does not account for local variations beyond adjusting for the local popularity of general vehicle. (See, Beck Chevrolet Co., Inc. v. General Motors, LLC, 787 F.3d 663 (2d Cir. 2015)). The Federal Court of Appeals indicated that the question was being certified to the New York Court of Appeals because the law regarding New York's Franchised Motor Vehicle Dealer Act was insufficiently developed for the court to ascertain its proper interpretation.

In response, the New York Court of Appeals recently held that GM's Retail Sales Index (RSI) was unlawful under VTL §463(2)(gg) because it does not account for local variations beyond adjusting for the local popularity of general vehicle types (Beck Chevrolet Co., Inc. v. General Motors LLC, 2016 NY Slip Op 03412 (May 3, 2016)). The Court stated "...GM's exclusion of local brand popularity or import bias rendered the standard unreasonable and unfair because these preference factors constitute market challenges that impact a dealer's sales performance differently across the state. It is unlawful under section 463(2)(gg) to measure a dealer's sales performance by a standard that fails to consider the desirability of the Chevrolet brand itself as a measure of a dealer's effort and sales ability." (Id. at 7)

GM's argument that the Administrative Law Judge erred as a matter of law in refusing to recognize the collateral estoppel effect of a disposition following a bench trial by the U.S. District Court for the Southern District of New York (Federal District Court) is unavailing in light of the recent decision of the New York Court of Appeals. As acknowledged by the appellant when requesting a stay of the instant proceeding pending the New York Court of Appeals answer to the first question certified by the Federal Court of Appeals, which the Board granted, it is clear that the resolution of the certified question by the New York Court of Appeals has a direct and significant impact on the outcome of this proceeding. The determination of the New York Court of Appeals is binding and consistent with the Administrative Law Judge's decision that GM lacked due cause to terminate Beck's franchise because, among other reasons, GM's sales performance standard was unfair and not reasonably applied.

The Administrative Law Judge's conclusion that the application of a statewide standard was not reasonable in this instance was supported by substantial evidence in the record. As the Administrative Law Judge points out, most of the dealers in the New York City metropolitan area were not meeting GM's statewide RSI standard and were not being terminated. In fact, among the

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underperforming dealers in the 9 downstate counties, GM was proceeding against Beck only, rendering the standard was unreasonable in its application. Beck's overall sales from 2009 (the time of the GM bankruptcy) to 2014 almost doubled from 218 sales to 417 sales, yet Beck's RSI went only from 40.4 to 50.2 when calculated using the statewide standard. Moreover, the evidence presented during the hearing established that, when compared to other similarly situated Chevrolet dealers in downstate New York, Beck's performance fell approximately in the middle of all of the dealers in this region. When calculations of the RSI were made using the Chevrolet market share in this downstate region, Beck's sales came very close to the 100 RSI goal. Moreover, evidence indicated that Beck met or exceeded the other requirements of the Participation Agreement.

Beck also indicated there were several factors beyond its control which affected the failure to reach the targeted RSI requirements. Consumer bias towards import vehicles, the effect of GM's exit from leasing programs, the education, age, and income demographics of the territory, and consumer patterns demonstrating preference for shopping to the north, particularly towards the New Rochelle area, are all factors which are outside of Beck's control. Pursuant to VTL §463(2)(e)(3), there is no cause for termination, "if the failure to demonstrate such substantial compliance was due to factors which were beyond the control of such dealer."

DECISION BY THE BOARD

The determination is affirmed. The original decision remains.

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SOAH ALJ Exceptions Letter

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State Office of Administrative Hearings

Kristofer S. Monson
Chief Administrative Law Judge

October 17, 2022

FILED
608-21-0988
10/19/2022 12:17 PM
STATE OFFICE OF
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Pegah Nasrollahzadeh, CLERK

ACCEPTED
608-21-0988
10/19/2022 12:31:11 pm
STATE OFFICE OF
ADMINISTRATIVE HEARINGS
Pegah Nasrollahzadeh, CLERK

Mark T. Clouatre **VIA EFILE TEXAS**
Nelson Mullins Riley & Scarborough LLP

James E. Cousar **VIA EFILE TEXAS**
Holland & Knight LLP

Dan K. Worthington **VIA EFILE TEXAS**
Ramón Worthington Nicolas & Cantu, PLLC

RE: Docket Number 608-21-0988.LIC; Texas Department of Motor Vehicles No. 21-0004-LIC; McAllen Jeep, Inc. d/b/a Bert Ogden Subaru v. Subaru of America Inc.,

Dear Parties:

The Administrative Law Judges have reviewed the exceptions and response filed in this matter. Bert Ogden Subaru's exceptions largely reurge the same issues raised in its brief, and for the reasons set out in the Proposal for Decision, the ALJs recommend rejecting them. The ALJs would note, however, that contrary to the exceptions, nothing in the PFD relied on the decisions in *All Star Imports* or *Bates Nissan*. Indeed, the ALJs agree with the exceptions letter that *All Star Imports* had nothing to do with the issue of sales, which is why on page 39-40, the PFD specifically noted that *All Star Imports*, while cited by Bert Ogden, did not support its position that a contract could not be terminated when sales had increased. Similarly, we found that *Bates Nissan* did not stand for that position, either.

Because we recommend changes be made to the PFD, it is ready for consideration.

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Sincerely,

Susan Rodriguez
Presiding Administrative Law Judge

Rebecca Smith
Co-Presiding Administrative Law Judge

CC: Service List

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Automated Certificate of eService

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Associated Case Party: Subaru of America Inc.,

Name	BarNumber	Email	TimestampSubmitted	Status
JAMES COUSAR		james.cousar@tklaw.com	10/19/2022 12:17:02 PM	SENT
MARK CLOUATRE		mark.clouatre@nelsonmullins.com	10/19/2022 12:17:02 PM	SENT
JESSE EMERSON		jesse.emerson@nelsonmullins.com	10/19/2022 12:17:02 PM	SENT
STEVEN MCFARLAND		steven.mcfarland@nelsonmullins.com	10/19/2022 12:17:02 PM	SENT
PATTIE NELSON		pattie.nelson@nelsonmullins.com	10/19/2022 12:17:02 PM	SENT
ADRIENNE TOON		adrienne.toon@nelsonmullins.com	10/19/2022 12:17:02 PM	SENT
ANDY BERTRON		andy.bertron@nelsonmullins.com	10/19/2022 12:17:02 PM	SENT
BRENT BISHOP		bbishop@atlashall.com	10/19/2022 12:17:02 PM	SENT
JOSEPH HABBOUCHE		jhabbouche@atlashall.com	10/19/2022 12:17:02 PM	SENT
MARIE MEDINA		marie.medina@txdmv.gov	10/19/2022 12:17:02 PM	SENT
DAN WORTHINGTON		dworthington@ramonworthington.com	10/19/2022 12:17:02 PM	SENT

Associated Case Party: McAllen Jeep, Inc. d/b/a Bert Ogden Subaru

Name	BarNumber	Email	TimestampSubmitted	Status
JAMES COUSAR		james.cousar@hklaw.com	10/19/2022 12:17:02 PM	SENT

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Bert Ogden Subaru's

Written Materials

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EXHIBIT
Adams 48

Message

From: Schmitt, Jim [jsc6@SUBARU.com]
Sent: 7/20/2020 8:01:26 PM
To: Griffin, Casey [cgri@SUBARU.com]
CC: Boyer, David [dboy@SUBARU.com]; Adams, David [dada@SUBARU.com]; Baker, Andrew [aba2@subaru.com]
Subject: Fwd: Bert Ogden
Attachments: Bert Ogden MSR Addendum (2).pdf

Casey:

As you'll recall from our DFW retailer review with the DFW zone late last month, it is their position that we should pursue termination of Bert Ogden Subaru. During the call, it was decided that the zone would collect data to support the case for termination and we would submit it to Scott McKessy and SOA Legal for advice and direction.

Attached is the sales performance and OLP data the zone pulled.

If you are in agreement, I believe the next step would be to forward the info to Scott then set up a call with SOA to discuss. Let me know how you want us to proceed.

Get Outlook for iOS

From: Boyer, David <dboy@SUBARU.com>
Sent: Friday, July 17, 2020 4:15 PM
To: Schmitt, Jim
Cc: Adams, David
Subject: Bert Ogden

Jim,

The purpose of my email is to follow-up on our DFW review conversation last month regarding Bert Ogden. It is the Zone's position termination should be pursued with this retailer based on not hitting the sales addendum targets, low MSR and poor OLP. See below for key metrics and attached for supporting information. Note the DFW Zone has supported the retailer with 247 market action units since the beginning of 2017. I am sure Jennifer has copies of the letters we sent to Bob over the last 3 years with status updates etc. Please review and let me know if there is any additional info you'd like prior to reviewing with SOA. I know you have experience with this process from previous actions and will gladly take your guidance. Thanks!

Sales Agreement Results:
Year #1: target 430, sales 326: 75.8%
Year #2: target 516, sales 338: 65.5%
Year #3: target 602, sales 358: 59.4%

Maui Units Provided by Year:
2017 – 82
2018 – 57
2019 – 84
2020 – 24

PROTESTANT'S EXHIBIT
332

MSR Performance by Year:
July 2017 – 41.26%: -514 units
July 2018 – 46.37%: -377 units
July 2019 – 38.34%: -542 units

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April 2020 – 37.97%: -580 units

OLP:
The retailer has consistently ranked at the bottom of the Zone in OLP for Purchase and Service:

	Bert Ogden OLP Rankings	
	Purchase	Service
2016	28/39	37/39
2017	42/42	27/42
2018	44/46	21/48
2019	43/45	33/45
2020 Thru June	44/44	43/44

Sales Efficiency:
The retailer would have sold 124, 142, and 124 more units during year 1, year 2 and year 3 respectively if they would have just acheived **average zone sales efficiency.** (Attached are the calculations by month).

David S. Boyer | Zone Retailer Development Manager | c. 610.393.2922 | DFW Zone | Subaru of America, Inc.

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In Section 9 of the Standard Provisions of the Dealer Agreement, Bert Ogden Subaru agreed to use its best efforts to aggressively, actively, and effectively promote the sale of Subaru Products in the Area of Responsibility through regular contacts with existing and prospective owners and users of Subaru Products, including participation in promotional events in accordance with reasonable SOA Directives.

Section 17.1.24 of the Standard Provisions of the Dealer Agreement provides that the failure of Bert Ogden Subaru to substantially fulfill, based upon evaluations by SOA, its responsibilities for the sale of Subaru Products, shall be considered sufficient cause for termination. In such event, SOA will notify Bert Ogden Subaru of any such failure and will review with Bert Ogden Subaru the nature and extent of such failure and the reasons, which, in SOA's opinion, account for such failure. Thereafter, SOA will provide Bert Ogden Subaru with a reasonable opportunity to correct the failure. If Bert Ogden Subaru fails to make substantial progress toward remedying such failure before expiration of such period, SOA may terminate the Agreement.

The Standard Provisions and the 2017 Addendum are expressly incorporated into the Dealer Agreement pursuant to Section 2 of the Dealer Agreement.

Bert Ogden Subaru's sales performance for 2016 to 2020 is summarized below:

Month/Year (RYTD)[1]	Retailer Total Sales	Agreed Cure Per 2017 Addendum	Dealer's Sales Above or Below Agreed Cure	Minimum Sales Responsibility (MSR)	Dealers Sales Above or Below MSR	MSR %	Ranking
Dec. 2016	330	-	-	885	-555	37.29%	Zone: 38/39 Region: 162/163
Dec. 2017	325	-	-	855	-530	38.01%	Zone: 42/42 Region: 161/161
June 2018	327	337	-10	673	-346	48.59%	Zone: 41/43 Region: 161/163
Dec. 2018	344	-	-	780	-436	44.10%	Zone: 41/43 Region: 161/163
June 2019	338	516	-178	880	-542	38.30%	Zone: 44/44 Region: 164/164
Dec. 2019	352	-	-	946	-594	37.21%	Zone: 44/44 Region: 164/165
June 2020	358	602	-244	871	-513	41.10%	Zone: 44/44 Region: 165/165

The foregoing shows Bert Ogden Subaru has failed, and continues to fail, to fulfill its responsibilities regarding its sales performance obligations and responsibilities for the sale of Subaru Products under the Dealer Agreement. Bert Ogden Subaru is not achieving MSR, is the worst performing Subaru dealer in the state of Texas, the Dallas-Ft. Worth Zone, the Central Region, and has not made any substantial progress toward achieving MSR or the reasonable benchmarks agreed to in the 2017 Addendum.

[1] Rolling-year-to-date or RYTD means the prior 12-month period ending on the month indicated.

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CONTACT REPORT

SUBARU

RETAILER: BERT OGDEN SUBARU - 040743
ADDRESS: EDINBURG, TX 78539
PHONE:

STATUS: REVIEWED
CONTACT DATE: 06-20-2019
AUTHOR: RICHARD E. YANNELLA
Reviewed on 06-26-2019 by David M. Adams

Personnel

Author	Reviewer
Richard E. Yannella: District Sales Manager	David M. Adams: Zone Director

Retailer Contacts

Robert C. Vackar: Dealer Executive Management

Geoff Mauldin: General Manager

Mario X. Cavazos: Dealer Executive Management

Metrics

MSR % Attainment Rolling 12-months As of: April 2019	40.07%	**Tech Training - % Attainment** Current Month As of: June 2019	238.01%
Purchase Satisfaction Score Rolling 3-months As of: June 2019	853	**Service Satisfaction Score** Rolling 3-months As of: June 2019	781
Units In Operation Calendar Year As of: June 2019	1,522	**Net Working Capital** Calendar Year As of: March 2019	$325,436
Profitability Calendar Year As of: May 2019	$213,411		

Current Issues

- MSR
- Profitability
- Tech Training % Attainment
- OLP Service
- OLP Sales
- LP Customer Commitment Award
- LP Community Commitment Award

EXHIBIT
70
SOAH 608-21-0988.LIC
MVD 21-0004-LIC

Discussions

Lead Management — Added on 06-24-2019

SUBARU **CONTACT REPORT**

RETAILER: BERT OGDEN SUBARU
CONTACT DATE: 06-20-2019
AUTHOR: RICHARD E. YANNELLA

Retailer has recently entirely toomany leads. Reviewed their currently lead handling metrics, which shows that so far this month they have received more leads that JK Subaru, Hicks Family Subaru and Sterling Subaru, yet their response time is the highest in the district, and their average number of contacts per lead is nearly the bottom. Retailer states that their BDC agent is handling about 400 leads per month, which is incredibly high. Expressed concern that these customers were not being adequately handled and that we need additional staffing in this area. GM states that if this BDC agent is unable to handle their lead counts, then they will have to get someone else. I told the GM that no matter who they have handling leads, 400 is too many for anyone, and that the answer is not to "hire someone else", but that they need to hire more people. GM ultimately had a conversation with their corporate director, who agreed the lead counts are too heavy and that they are considering doing a centralized BDC.

MSR Added on 06-24-2019

Retailer states that they'd like to know 40 units per month is the number that we keep asking them to perform at. Advised that this is based on their current SOSA information and that the number we want them hitting is actually much larger than that, but we need them to hit 40 units per month first. MSR is currently at 71 units per month, based on April 2019 RYTD registration data. Reminded them that we are providing them the additional inventory to hit 40 units per month and that our long-term goal is to be at 100% MSR.

Sales Efficiency Added on 06-24-2019

Retailer continues to state that they need additional Forester inventory. Reminded them that are not outperforming the zone in efficiency on this carline and that their DFW Zone peers are ultimately moving these at a faster rate. Retailer is currently ranked 33rd in terms of invenory counts on this carline, but is second to last in sales throughout the DFW Zone.

Sales Initiative Added on 06-24-2019

Upon arriving at the retailer, found that there was no employees in the showroom. When I ultimately found GSM and GM, they told me that two consultants were off dealing with personal issues, which only leaves them with one. Challenged them on this and reminded them they told me they had five, to which the GM responded they have two "in the pipeline". Ultimately had a one on one conversation with General Manager explained that their staffing levels are incredibly concerning, and that their model of being able to have consultants sell other brands is not conductive to our volume goals at the store. GM tells me that cross-selling very rarely occurs. Their GSM ultimately told me that this is not true and that it happens much more than he's comfortable with. GSM also tells me that their GM has been slow to hire people.

GM ultimately tells me that they are trying to hire people, but having the ability to cross-sell is something that Bert Ogden has at all of their stores. Told him that our staff is spread very thinly as well, and we ultimately want a dedicated Sales Manager. GSM is in tune with the brand, but is now covering Mazda, Volvo and Kia. We are also one BDC agent with these brands. See lead handling section.

Wholesale Allocation Added on 06-24-2019

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SUBARU **CONTACT REPORT**

RETAILER:	BERT OGDEN SUBARU
CONTACT DATE:	06-20-2019
AUTHOR:	RICHARD E. YANNELLA

Met with Bob Vackar, Geoff Mauldin and Mario Cevazos to discuss inventory situation at the retailer. Mr. Vackar has stated repeatedly that he does not believe he has the inventory necessary to attain 40 units per month. Advised Mr. Vackar that based on their inventory counts throughout the year, if they were to have turned their provided inventory at zone level, they would have sold exactly 40 units per month on average. Retailer is consistently below zone level is sales efficiency, and based on their lack of turn rate, the unit count variance that results from lack of efficiency is 62 units on the year. Mr. Vackar states that "they are better than the zone". Repeatedly told his staff that it's their job to make sure they are consistently ask for extra inventory, and states that SOA has more to provide that they are not providing. Of course stated that this was not true. Agreed that moving forward, we'd continue to provide MAUI support, but Bert Ogden Subaru will have a conversation with the DSM prior to offering regarding colors, options, etc. Mr. Vackar's main concern was on Forester, which I ppinted out his ground stock is five days higher than DFW Zone level, and when you take into account their pipeline, they are 55 days ahead of zone level.

When discussing with Mr. Vackar, reminded with GM that they are consistently turning inventory well below zone level rate, which he acknowledged. Also asked GM and GSM if they felt their inventory counts were sufficient to hit 40 units per month, which they said they believe it is close, but we need to continue working on model mix. Reminded them that I have always helped them when asked, and it is their responsibility to reach out regarding changing colors, options, models, if it can't be done via SPF. Retailer has never been proactive on this.

Wholesale Allocation Added on 06-24-2019

Email to Bert Ogden Subaru on most recent allocation (allo 7) offering additional six units. Units offered were six Foresters and two Outbacks:

Good Afternoon Mr. Vackar, Natasha, Geoff and Mario,

Thank you for your continued support in the Rio Grande Valley area. In an effort to continue providing support to Bert Ogden Subaru, and to provide ample inventory levels to reach MSR goals, Dave and myself were able to come up with an additional six units to be offered for Allocation 7. Please let us know what we can do to continue supporting your efforts to continue growing the brand in your market.

The units offered are currently in the Dealer Order System, and are shown below. These units offer a mix of some of our best-selling product, and give a nice variety of color and option packages. Please let me know if you have any questions. Thank you.

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Testimony of Troy Poston - Hearing Record at Page 189, lines 23-25 – Page 190, lines 1-4

Q (BY MR. WORTHINGTON) Mr. Poston, it would be unfair -- if Subaru edited out all of the positive comments and left only the negative comments with regard to the OLP narratives it has marked as exhibits in this case, that would be unfair and misrepresent Bert Ogden's performance. True?

A True.

Testimony of Troy Poston - Hearing Record at Page 289, lines 18-25 – Page 290, lines 1-2

Q Yes, sir, my question to you was: Subaru was aware of the employees and entered into the agreement with Bert Ogden. True?

A True.

Q And it's now not going to say that Bert Ogden was in breach of that agreement because it didn't have the certified -- certified employee listed under requirement because Bert Ogden -- Subaru knew that when it entered into the agreement. Right?

A Right.

Testimony of Troy Poston - Hearing Record at Page 207, lines 20-25

Q Yes, sir. But my question is: Is there a written policy of which you're aware that states to a retailer like Bert Ogden any certain percentage ranking, irrespective of score, amounts to a breach of the franchise agreement?

A I'm not aware of that.

Testimony of Casey Griffin – Hearing record at Page 741, lines 5-15

Q Okay. Is there anything in this letter that has to do with the adequacy of the dealer's service facilities?

A Again, I -- it's not in this letter.

Q Okay. Anything that has to do with the adequacy of the dealer's equipment?

A No, I -- I have not seen it in this letter.

Q Okay. Anything to do with the adequacy of the dealer's parts?

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A No, I don't believe it mentions parts in this letter.

Testimony of David Adams - Hearing Record at Page 367, lines 14-25.

Q (BY MR. CLOUATRE) All right. This is a series of emails between you and Mr. Lucio. Correct?

A Correct.

Q Again, what were you advising Mr. Lucio of?

A Well, I was going to be sending Bob a letter. The letter had to do with the fact they turned down vehicles despite our attempt to show him why that would not be really good when he had been requesting, you know, up to this time for more vehicles.

Q And what's your understanding of who needed to approve turndowns of vehicles at this dealership?

A Only Bob Vackar.

Testimony of David Adams - Hearing Record at Page 469, lines 14-20.

Q (BY MR. WORTHINGTON) Mr. Adams, you told us earlier when you were asked about Mr. Vackar, you said you had a -- let me find the words or comment here, a mutual relationship that allowed you to speak with him. So did you call Mr. Vackar often?

A I don't know that it was often. We probably talked twice a year if I had to put a guess on.

Testimony of David Adams - Hearing Record at Page 473, lines 17-22.

Q (BY MR. WORTHINGTON) And at the bottom the last sentence above Sincerely, Mr. Vackar writes: Please contact me -- and he gives you his personal cell number -- for any questions or concerns. Do you see that?

A I see it.

Testimony of Bob Vackar – Hearing Record at Page 2084, lines 24-25 - Page 2085, lines 1-4.

Q Mr. Vackar, there has been testimony in this hearing in an exhibit introduced that reflect 42 declined inventory vehicles by Bert Ogden. Did you authorize any inventory to be declined?

A No.

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Allocation History

01/29/2021

							SSLP			Allocated VONS				Percent Returned vs. Retail					
Allocation Month	MAUI Distributed	DBA-DSM	Original VONs	Match - Count	Match - Percent	TD'd or Moved	SSLP Convert	SSLP Increm	SSLP Total	Stock VONs	+/- Orig. Allocated VONs	Sold VONs	Total Allocated VONS	PM	Stock	w/SOR	90-Day	Stock	w/SOR
1-18	0	060-04-03-040743-BERT OGDEN SUBARU	27	26	96.3%	(1)				27			27	21	128.6%	128.6%	27.0	100.0%	100.0%
2-18	0	060-04-03-040743-BERT OGDEN SUBARU	12	11	91.7%	(1)				11	(1)		11	21	52.4%	52.4%	24.0	45.8%	45.8%
3-18	15	060-04-03-040743-BERT OGDEN SUBARU	12	12	100.0%	0	0	0	0	27	15	0	27	19	142.1%	142.1%	20.0	135.0%	135.0%
4-18	3	060-04-03-040743-BERT OGDEN SUBARU	20	17	85.0%	(3)				23	3		23	25	92.0%	92.0%	21.3	107.8%	107.8%
5-18	18	060-04-03-040743-BERT OGDEN SUBARU	26	24	92.3%	(2)				44	18	1	45	35	125.7%	128.6%	26.3	167.1%	170.9%
6-18	2	060-04-03-040743-BERT OGDEN SUBARU	27	19	70.4%	(8)				29	2		29	28	103.6%	103.6%	29.3	98.9%	98.9%
7-18	3	060-04-03-040743-BERT OGDEN SUBARU	28	26	92.9%	(2)				31	3	2	33	33	93.9%	100.0%	32.0	96.9%	103.1%
8-18	9	060-04-03-040743-BERT OGDEN SUBARU	20	16	80.0%	(4)				29	9		29	31	93.5%	93.5%	30.7	94.6%	94.6%
9-18	6	060-04-03-040743-BERT OGDEN SUBARU	12	10	83.3%	(2)				18	6	3	21	29	62.1%	72.4%	31.0	58.1%	67.7%
10-18	7	060-04-03-040743-BERT OGDEN SUBARU	10	10	100.0%					17	7	2	19	24	70.8%	79.2%	28.3	60.0%	67.1%
11-18	5	060-04-03-040743-BERT OGDEN SUBARU	21	19	90.5%	(2)				26	5	3	29	37	70.3%	78.4%	30.3	85.7%	95.6%
12-18	8	060-04-03-040743-BERT OGDEN SUBARU	18	15	83.3%	(3)				26	8		26	22	118.2%	118.2%	27.7	94.0%	94.0%
1-19	5	060-04-03-040743-BERT OGDEN SUBARU	36	36	100.0%					41	5		41	39	105.1%	105.1%	32.7	125.5%	125.5%
2-19	6	060-04-03-040743-BERT OGDEN SUBARU	12	11	91.7%	(1)				18	6		18	22	81.8%	81.8%	27.7	65.1%	65.1%
3-19	7	060-04-03-040743-BERT OGDEN SUBARU	11	11	100.0%					18	7		18	18	100.0%	100.0%	26.3	68.4%	68.4%
4-19	7	060-04-03-040743-BERT OGDEN SUBARU	14	14	100.0%					21	7		21	26	80.8%	80.8%	22.3	94.0%	94.0%
5-19	6	060-04-03-040743-BERT OGDEN SUBARU	19	16	84.2%	(3)				25	6		25	29	86.2%	86.2%	26.0	96.2%	96.2%
6-19	4	060-04-03-040743-BERT OGDEN SUBARU	39	37	94.9%	(2)	0	0	0	43	4	0	43	31	138.7%	138.7%	28.7	150.0%	150.0%
7-19	6	060-04-03-040743-BERT OGDEN SUBARU	14	14	100.0%					20	6		20	29	69.0%	69.0%	29.7	67.4%	67.4%
8-19	20	060-04-03-040743-BERT OGDEN SUBARU	20	16	80.0%	(4)				40	20		40	31	129.0%	129.0%	30.3	131.9%	131.9%
9-19	10	060-04-03-040743-BERT OGDEN SUBARU	8	7	87.5%	(1)				18	10		18	29	62.1%	62.1%	30.0	60.0%	60.0%
10-19	10	060-04-03-040743-BERT OGDEN SUBARU	27	25	92.6%	(2)				37	10	2	39	44	84.1%	88.6%	35.7	103.7%	109.3%
11-19	12	060-04-03-040743-BERT OGDEN SUBARU	32	30	93.8%	(2)				44	12		44	24	183.3%	183.3%	33.0	133.3%	133.3%
12-19	7	060-04-03-040743-BERT OGDEN SUBARU	23	23	100.0%					30	7		30	25	120.0%	120.0%	31.0	96.8%	96.8%
01-20	8	060-04-03-040743-BERT OGDEN SUBARU	15	15	100.0%					23	8		23	33	69.7%	69.7%	27.3	84.1%	84.1%
02-20	6	060-04-03-040743-BERT OGDEN SUBARU	24	20	83.3%	(4)				30	6		30	33	90.9%	90.9%	30.3	98.9%	98.9%
03-20	7	060-04-03-040743-BERT OGDEN SUBARU	32	31	96.9%	(1)				39	7		39	25	156.0%	156.0%	30.3	128.6%	128.6%
04-20	0	060-04-03-040743-BERT OGDEN SUBARU	18	17	94.4%	(1)				18			18	28	64.3%	64.3%	28.7	62.8%	62.8%
05-20	0	060-04-03-040743-BERT OGDEN SUBARU	23	21	91.3%	(2)				23			23	25	92.0%	92.0%	26.0	88.5%	88.5%
06-20	0	060-04-03-040743-BERT OGDEN SUBARU	8	7	87.5%	(1)				8			8	29	27.6%	27.6%	35.7	22.4%	22.4%
07-20	7	060-04-03-040743-BERT OGDEN SUBARU	40	38	95.0%	(2)				47	7		47	42	111.9%	111.9%	49.7	94.6%	94.6%
08-20	0	060-04-03-040743-BERT OGDEN SUBARU	27	22	81.5%	(5)				27			27	21	128.6%	128.6%	56.7	47.6%	47.6%
09-20	0	060-04-03-040743-BERT OGDEN SUBARU	33	30	90.9%	(3)				33			33	30	110.0%	110.0%	31.0	106.5%	106.5%
10-20	15	060-04-03-040743-BERT OGDEN SUBARU	29	28	96.6%	(1)				44	15		44	34	129.4%	129.4%	28.3	155.3%	155.3%
11-20	30	060-04-03-040743-BERT OGDEN SUBARU	31	28	90.3%	(3)		20	20	61	30		61	31	196.8%	196.8%	31.7	192.6%	192.6%
12-20	5	060-04-03-040743-BERT OGDEN SUBARU	51	46	90.2%	(5)				56	5		56	67	83.6%	83.6%	44.0	127.3%	127.3%
01-21	5	060-04-03-040743-BERT OGDEN SUBARU	61	57	93.4%	(4)				66	5		66	50	132.0%	132.0%	49.3	133.8%	133.8%
02-21	5	060-04-03-040743-BERT OGDEN SUBARU	54	48	88.9%	(6)				59	5		59	50	118.0%	118.0%	55.7	106.0%	106.0%

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SOA000005

Hearing Exhibit 141-002

Back to AGENDA



Purchase Comment Detail Report

Comment Theme and Sub-theme Definitions

040743 Bert Ogden Subaru — Subaru Central (CEN)
Subaru Sales of 500-999 — 10/2/2021
CEN-DFW-03 (DPSM) — Qtr 1, 2021

Comment Theme	Theme	Comment Text	Comment Sub-Theme	Valence /Tone	LP Moment
000 Staff	000 Staff				
		The sales person was courteous and knowledgeable about the car and it's functions. He was also very patient and understanding with our questions as we are elderly.	001	Positive	
		Knowledge and attentiveness of the sales team was outstanding.	001	Positive	
		All personnel that we interacted with were both professional and knowledgeable about their automobiles. They spent plenty of time introducing us to the various safety devices in the car and was very helpful in helping us make the right selection that would be best suited to our lifestyle. Understood what our needs were and satisfied them.	001	Positive	
		The salesman, Rich Keane was very knowledgeable about Subarus. We arrived at the dealership looking for a Volvo XC 90 but were so impressed with the Subaru that Rich demonstrated to us that he sold us.	001	Positive	
		Austin the salesman was great, he was very helpful, explaining all the details of the car	002	Positive	
		Get more salesmen like Alex! Really goes above and beyond to put me in the right vehicle that fits my needs. Will strongly recommend others to talk to Alex!	002	Positive	
		They were understanding and helped me buy my first car which happened to be a car that I LOVE	002	Positive	
		Staff was very helpful! They worked with me to make sure I was happy with the purchase!	002	Positive	
		Just overall problems with the car cosmetically that weren't really taken care of.	002	Positive	
		I felt no pressure from my either Tim my sale sales person or Joe the GM. I told them exactly what I wanted, no extras. They listened to me. Gave me a great offer on my trade in. The questions I had about the WRX they were able to answer very quickly. They were not wasting my time. I have purchased numerous cars in the past and this was my best experience ever.	002	Positive	
		Knowledge and attentiveness of the sales team was outstanding.	002	Positive	
		I was there for such a short period of time. Everyone was very courteous and helpful.	002	Positive	
		They helped us right away and were very conscious and clean about the pandemic.	002	Positive	
		The sales person was courteous and knowledgeable about the car and it's functions. He was also very patient and understanding with our questions as we are elderly.	003	Positive	
		I recommend Bert Ogden for purchase of vehicle, they are very professional and helpful made it a good experience.	003	Positive	
		We had one of the worst experiences ever buying this Subaru. The manager Job kept insisting that we couldn't buy the Subaru without a protection package even though the salesman told us it was optional. Make things worst he told us that .9 apr was not available if we got the discounts there were offering online. We should've never bought here because of the lies they tell the customers. Then the salesman just kept trying to go help other customers because to his words "we were being to difficult".	003	Negative	
		The salesman was very professional but friendly.	003	Positive	
		All personnel that we interacted with were both professional and knowledgeable about their automobiles. They spent plenty of time introducing us to the various safety devices in the car and was very helpful in helping us make the right selection that would be best suited to our lifestyle. Understood what our needs were and satisfied them.	003	Positive	
		The dealership seemed understaffed, but everyone was courteous and I have no specific complaints.	003	Positive	
		My sales rep was Austin F, he was amazing. I did not give extraordinary due to the management. Otherwise Austin would given this survey Extraordinary.	004	Negative	
		Had sensor problem on my new Subaru when I started to drive home. However the sales manager took care of us with another car to use till it got fixed.	004	Positive	
		My experience was out of this world! I didn't believe there was such a thing as a perfect car consultant! Jairo Trevino from Bert Ogden Mazda, Subaru and Volvo! The best there is!	006	Positive	
		Hire more sales staff like Alexander Gonzalez	006	Positive	

PROTESTANT'S EXHIBIT 384

72
219
33%

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STATE OFFICE OF ADMINISTRATIVE HEARINGS RECEIVED ON 1/7/2022 4:20 PM

FILED
608-21-0988
1/7/2022 4:20 PM
STATE OFFICE OF
ADMINISTRATIVE HEARINGS
Carol Hale, CLERK

ACCEPTED
608-21-0988
1/7/2022 5:02:15 pm
STATE OFFICE OF
ADMINISTRATIVE HEARINGS
Carol Hale, CLERK

McAllen Jeep, Inc., d/b/a Bert Ogden Subaru's
Amended Objections to Exhibit List Proposed by Subaru of America

Exhibit	Description	Objection
39	**Declaration of Sue Adams**	Hearsay. Undisclosed Witness.
45	**Third Party Review Report**	Hearsay. Violative of TRE 403. Edited report which excludes positive comments.
46-49	**Service Comment Detail Report**	Violative of TRE 403. Edited report which excludes positive comments. Rule 107 requires entire report for this document to be admitted. Entire report not in possession of BOS for time period covered in these exhibits.
161	**SAF Advertising Analysis**	Lack of proper foundation and lack of identification of alleged, reliable underlying data which allegedly forms the basis of this Line Graph. Objection to vague and conclusory allegations with no foundational data. Hearsay. Exhibit 161-002 contains four (4) bulletin point statements which are conclusory, are hearsay and fail to identify the source of information allegedly being summarized – and further fail to identify who the author is of the document (and/or the source of figures contained in any aspect of Exhibit 161).

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PROTESTANT'S EXHIBIT 377

From: "Doll, Tom" <tdol@subaru.com>
Date: Friday, October 29, 2021 at 2:16 PM
To: Jorge Gutierrez <jorge.gutierrez@bertogden.com>, "thomas.doll@subaru.com" <thomas.doll@subaru.com>
Cc: 'Natasha Del Barrio' <natashadb@bertogden.com>
Subject: RE: Letter from Bert Ogden Subaru

Dear Mr. Gutierrez,

Thank you so much for sharing your wonderful letter from the University of Texas Rio Grande Valley in support of our Subaru Loves Learning Initiative!! I can't thank you enough for your support!! This sizable donation will certainly solidify you in the Rio Grande Valley area. Thank you for your commitment to our brand's Love Promise!!

Best wishes and continued success.

Sincerely, Tom

From: Jorge Gutierrez <jorge.gutierrez@bertogden.com>
Sent: Friday, October 29, 2021 10:07 AM
To: thomas.doll@subaru.com; Doll, Tom <tdol@subaru.com>
Cc: 'Natasha Del Barrio' <natashadb@bertogden.com>
Subject: Letter from Bert Ogden Subaru

CAUTION: This email has originated from outside of SOA. Do not click on links or open attachments unless you recognize the sender and know the content is safe.

Good afternoon Mr. Doll,

Please find the attached letter from Mr. Robert C. Vackar, Chairman of the Board and Chief Performance Officer of the Bert Ogden Auto Group in Texas.

Original document has been sent to you as well sir.

Regards,

Jorge A. Gutierrez, MBA

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SOAH DOCKET NO. 608-21-0988.LIC
MVD DOCKET NO. 21-0004-LIC

MCALLEN JEEP, INC.	§	
d/b/a BERT OGDEN SUBARU,	§	
Petitioner	§	**BEFORE THE STATE OFFICE**
	§	
vs.	§	**OF**
	§	
SUBARU OF AMERICA, INC.,	§	
Respondent	§	**ADMINISTRATIVE HEARINGS**

FINAL ORDER

The referenced contested case matter is before the Board as a Proposal for Decision (PFD) from the State Office of Administrative Hearings (SOAH) addressing Subaru of America's (SOA) proposed termination of McAllen Jeep, Inc. (Bert Ogden).

The Board enters this final Order, having considered the evidence, arguments, findings of fact and conclusions of law presented in:

1. The hearing record and the Administrative Law Judges (ALJs) July 19, 2022 PFD;
2. Bert Ogden's August 3, 2022 Exceptions to the ALJ PFD, Including attachments A and B;
3. Subaru's August 18, 2022 Reply to Bert Ogden's Exceptions to the PFD, including Exhibit A;
4. The ALJs' October 17, 2022 Exceptions Letter.
5. The Written Materials submitted by Bert Ogden on March 23, 2023; and
6. The Written Materials submitted by SOA on March 23, 2022.

All changes to findings of fact and conclusions of law in the PFD here set out are adopted by the Board pursuant to Texas Government Code Section 2001.58(e) because the PFD in each instance misapplied or misinterpreted applicable law and misinterpreted prior TDMV decisions.

ACCORDINGLY, IT IS ORDERED:

1. That findings of fact numbers 1-31, 33-37, 42, 48, 53-55, 62, 63, 81-84, 92 and conclusions of law numbers 1-4, 6-9, as set out in the ALJ's July 19, 2022 PFD are hereby adopted;

   That findings of fact numbers 38-40, 43, 44, 47, 49-51, 60, 70-75, 77, 87-88 and conclusions of law numbers 5, 10 and 11 as set out in the ALJ's July 19, 2022 PFD are hereby modified as noted below:

   a. Finding of fact 32. Bert Ogden consistently failed to achieve its MSR. However, even if Bert Ogden had "turned" that is sold the vehicles it was allocated by SOA at the DFW Zone average, it would not have achieved its MSR.

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b. Finding of fact 52. Bert Ogden's sales in relation to the market does not support termination. The PFD specifically failed to address the relevant fact that Bert Ogden's sales in the market far exceeded those of any of SOA's previous eight dealers in the relevant market, and that each of those dealers failed or surrendered their SOA franchise while Bert Ogden's sales consistently improved during the period at issue.

c. Finding of fact 56. The Dealer Principal of Bert Ogden invested a substantial sum in the dealership and these investments would be greatly harmed by the termination.

d. Finding of fact 57. This factor weighs against termination.

e. Finding of fact 61. SOA's scale for OLP scores go from 0 to 1000, with a score of 751 - 1000 being closest to the "extraordinary" scoring anchor. Under this SOA created scoring system, Bert Ogden Subaru's sales and service customers rated it closer to "extraordinary" than to "very good" for every year from 2016 through 2021. The PFD misinterpreted applicable law by relying on a comparative score with other dealers rather than the customers' actual stated satisfaction with Bert Ogden and by admitting into evidence a highly prejudicial and unreliable compilation by SOA of only negative customer reviews taken from third party sources which could not be verified.

f. Finding of fact 64. SOA did not indicate how quickly it would install a new dealer.

g. Finding of fact 65. There is benefit to the public to continuing Bert Ogden's dealership agreement, considering the dealership's consistently extraordinary purchase and service satisfaction rankings.

h. Finding of fact 66. The possibility of inconvenience to customers during the transition to a new dealer, and the benefit of leaving Bert Ogden's dealership agreement in place, outweighs the harm to the public of a new Subaru dealer.

i. Finding of fact 67. This factor weighs against termination.

j. Finding of fact 76. Bert Ogden had a Subaru-exclusive parts manager from 2019 through 2021.

k. Finding of fact 78. Bert Ogden employed a Subaru-exclusive service manager from 2019-2021. During those years, the service manager position was not shared with other Bert Ogden Group dealerships.

l. Finding of fact 79. Bert Ogden employed a Subaru-exclusive service advisor from 2019- 2021. During those years, the service advisor position was not shared with other Bert Ogden Group dealerships.

m. Finding of fact 80. There is insufficient evidence to find that Bert Ogden had inadequate service parts, equipment, and personnel in relation to other dealers of new motor vehicles of the same line-make, which weighs against termination.

n. Finding of fact 85. Although Bert Ogden had increases in each year, the dealership did not meet any of the 2018-2020 sales requirements in the 2017 Sales Performance Addendum.

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o. Finding of fact 86. Bert Ogden was not allocated sufficient vehicles in any year to allow it to meet the sales requirements set out in the 2017 Sales Performance Addendum for the years 2018-2020.

p. Finding of fact 89. SOA did not provide Bert Ogden with an opportunity to cure its performance with the Sales Performance Addendum requirements.

q. SOA breached the franchise agreement by failing to provide Bert Ogden notice and opportunity to cure alleged breaches of the franchise agreement as required by Section 17.1 of the franchise agreement.

r. Finding of fact 90. This factor does not weigh in favor of termination.

s. Finding of fact 91. The Dealer Agreement contains standard terms required by SOA and was not subject to negotiation by Bert Ogden and was drafted solely by SOA.

t. Finding of fact 93. SOA is seeking termination solely to increase market penetration.

u. Conclusion of Law 5. Notice of Hearing was not properly provided. Tex. Occ. Code §§2301.705, .707; Tex. Gov't Code §§2001.051-.052; Tex. Admin. Code §§215.34.

v. Conclusion of Law 10. SOA did not meet its burden of demonstrating good cause for the termination of Bert Ogden's franchise. Tex. Occ. Code §2301.453(g).

w. Conclusion of Law 11. Bert Ogden's protest should be granted, and the termination of Bert Ogden's franchise should be denied.

2. That SOA's proposed termination against BOS is denied;

3. That BOS' protest of the proposed termination is granted because SOA failed to establish good cause for the termination of its franchise agreement with BOS;

4. That any finding of facts or conclusions of law proposed by the parties that are not adopted in this Order are hereby rejected; and

5. That all remaining motions, exceptions or objections, of any party, if any, are hereby denied.

Date:_____

_____
Charles Bacarisse, Chair
Board of Texas Department of Motor Vehicles

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Subaru of America's

Written Materials

Back to AGENDA

Tr. Vol. 1 at 68:20-69:21 (Troy Poston)

Back in 2009 when Bert Ogden opened as a Subaru dealer, do you know how many sales Subaru made as a whole in the entire D/FW zone?

A Yeah. So in 2009, it was approximately 7500 units were sold in that territory that was outlined on that map.

69

Q 7500?

A Right.

Q Can you tell us how many units the Subaru brand sold in the Dallas zone in 2019 prior to COVID and supply chain issues?

A It was right at 45,000.

Q Okay. So six-and-a-half times the sales that it made when Bert Ogden first started in 2009?

A That's correct.

Q And how many years prior to COVID did the Subaru brand see consecutive growth?

A 12, 13 years of sales growth.

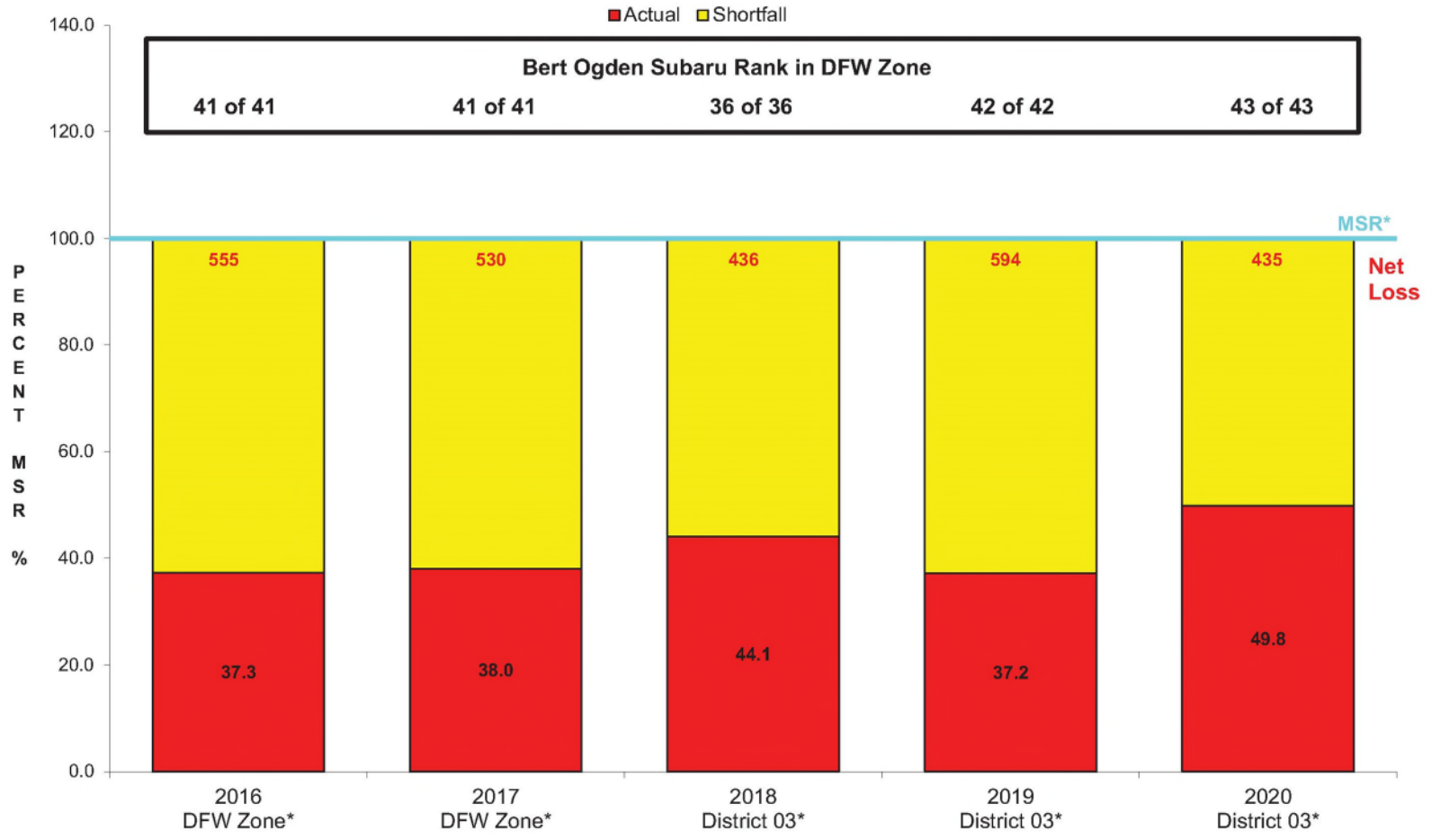
Q Safe to say Subaru is a very different brand than it was in 2009?

A Yes. I mean, if you -- if you read, we've basically been called the darling of the industry over the last decade. And, yeah, there were a lot of fundamental changes that we made with our brand, starting in around 2006-2007 that started to really kick in in around 2009, and then it's been steady growth every year since, up until COVID, of course.

Back to AGENDA

Subaru of America

Bert Ogden Subaru (Edinburg)
Percent of MSR*



Ranking includes Full Year Dealers Only

* Market Share Adjusted for Local Segment Popularity

Data By: Subaru MSR File

URBAN SCIENCE

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Urban Science Applications Inc. Detroit, MI

Serial: 728891

Hearing Exhibit 188-043

CONFIDENTIAL

Back to AGENDA

EXHIBIT A

SUBARU

SALES PERFORMANCE ADDENDUM TO SUBARU DEALERSHIP AGREEMENT

This Addendum is made this first day of July, 2017, by and between McAllen Jeep, Inc. ("Dealer") and Subaru of America, Inc./Central Region ("Distributor").

WHEREAS, Dealer's Subaru Dealership Agreement and Standard Provisions ("Agreement") commenced on July 1, 2017, which Agreement is incorporated herein by reference as though set forth at length;

WHEREAS, Dealer's performance has failed to meet the Subaru Minimum Standards agreed to by Dealer and incorporated by reference into the Agreement with respect to sales performance as evidenced by Dealer's Subaru Minimum Sales Responsibility (MSR);

WHEREAS, Dealer acknowledges that said failure to meet required Subaru MSR constitutes a material breach of the Agreement; and

WHEREAS, Dealer desires to continue operations as an authorized Subaru dealer even without meeting the required Subaru MSR.

NOW THEREFORE in consideration of these premises, Dealer and Distributor agree as follows:

1. Dealer acknowledges that its performance is deficient in the following areas:

   April 2017 Rolling Year to Date (RYTD) Minimum Sales Responsibility= 860
   Dealer New Vehicle Sales= 359
   Deficiency= 501

   Definition: Minimum Sales Responsibility = Number of new vehicle sales required to meet minimum Benchmark Market Share (Higher of Zone or District) in Dealer's Area of Responsibility.

   Definition: Benchmark Market Share = Segment share attained by Performance Benchmark Group (Higher of Zone or District).

2. Dealer agrees to exercise its best efforts to cure these deficiencies as soon as possible. In any event, within thirty-six (36) months of the effective date of the Agreement, Dealer will meet its Subaru MSR by attaining the following sales milestones:

   - **Increase Subaru new vehicle sales to 50% of current MSR or a total of 430 new Subaru vehicles within the twelve-month period starting July 1, 2017 and ending on June 30, 2018**
   - **Increase Subaru new vehicle sales to 60% of current MSR or a total of 516 new Subaru vehicles within the twelve-month period starting July 1, 2018 and ending on June 30, 2019**
   - **Increase Subaru new vehicle sales to 70% of current MSR or a total of 602 new Subaru vehicles within the twelve-month period starting July 1, 2019 and ending on June 30, 2020**

   During the time period established in Paragraph 2, the MSR and Benchmark Market Share will be compiled, and made available to the Dealer as soon as they are available. If the number of sales necessary to achieve 100% sales penetration at the standard set forth above is less than 860 units within the RYTD, based on market conditions during that period of time, Dealer will be held to this lower standard of sales in order to cure the breach.

EXHIBIT 12

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EXHIBIT A

SUBARU

SALES PERFORMANCE ADDENDUM TO SUBARU DEALERSHIP AGREEMENT

3. Dealer agrees that its failure to achieve, at a minimum, 430 new Subaru vehicles sales from July 1, 2017 to June 30, 2018; 516 new Subaru vehicles sales from July 1, 2018 to June 30, 2019; and 602 new Subaru vehicles sales from July 1, 2019 to June 30, 2020 (unless reduced pursuant to Paragraph 2 above) shall constitute a material breach of the Agreement.
4. This Addendum is not intended to confer any right, benefit or claim upon any person or entity other than Dealer or Distributor.
5. Except as modified by this Addendum, all terms, conditions and provisions of the Agreement shall remain in full force and effect.

IN WITNESS WHEREOF the parties have hereunto set their signatures on the date first herein above written.

SUBARU OF AMERICA, INC./ Central Region By:	McAllen Jeep, Inc. McAllen, TX. By:
esigned Casey P. Griffin Regional Vice President	esigned Robert C. Vackar President

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Tr. Vol. 1 at 113:21-114:19 (Troy Poston)

Okay. Let's look at Paragraph 2, the next paragraph. I want to look at the cure this time because it's different than the one we saw last time. We know the last agreement gave Bert Ogden one year, 12 months, to cure. How long did Subaru give Bert Ogden to improve

114

its performance on this addendum?

A Three years.

Q During your time with Subaru, have you ever seen a dealer get a three-year MSR addendum?

A No. This was a big reach for us, you know. Typically, a three-year agreement is for someone who's in very good standing. This is a three-year agreement for someone who's not in good standing on sales performance and -- but, you know, again, in our effort to try, it's to say, Hey, let's just -- let's come up with something that is more than doable and -- and just get a degree of success, and then maybe we can go from there and get a little bit more and a little bit more, was really all I was hoping for with this.

And so that's why we set -- set the bar so low. So let's do that, and that way we're not back and forth with agreements and things. Let's give it a longer runway, longer period of time to kind of talk it through, work it through.

Back to AGENDA

SUBARU

May 7, 2018

Mr. Robert C Vackar
Bert Ogden Subaru
4221 S Business 281
Edinburg, TX 78539

Dear Bob,

I wanted to give you an update on Bert Ogden Subaru sales vs. your agreed upon Min Sales target for Year 1 of our sales addendum.

Compared with the sales goals that began in July 2017 and continue through June 2018, your store is behind by 97 units.

	Sales	Target	Difference
July 2017	30	36	-6
Aug 2017	24	36	-12
Sept 2017	31	36	-5
Oct 2017	29	36	-7
Nov 2017	21	36	-15
Dec 2017	21	36	-15
Jan 2018	19	36	-17
Feb 2018	25	36	-11
Mar 2018	35	36	-1
Apr 2018	28	36	-8
	263	360	-97

As you are aware, you also turned down a supplemental June 2018 allocation that the Dallas Zone provided to help insure your ability to hit your 1st year monthly target of 36 units per month. We are very concerned that you will not be able to hit your agreed upon yearly targets moving forward as a result. See attached.

New car sales are at an all-time high for Subaru – in fact we just recorded our 77th subsequent sales increase in April. The DFW Zone is up 6% YoY, whereas Bert Ogden Subaru is down 9%.

Please contact me with any questions.

Sincerely,

David Adams
DFW Zone Retailer Development Manager
949-636-7170

2600 Network Blvd #610
Frisco, TX 75034

EXHIBIT
111

Back to AGENDA

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Adams, David

From: Youngman, Nic
Sent: Friday, May 04, 2018 10:24 PM
To: mario.cavazos@bertogden.com
Cc: Poston, Troy; Bob Vackar (bv@bertogden.com); Juan Rodriguez (juan.rodriguez@bertogden.com); Robert Lucio (rl@bertogden.com); Adams, David
Subject: Bert Ogden Summary of Allocation #6 2018

Good Evening Mario,
Per our discussion earlier today I just wanted to summarize allocation #6. Bert Ogden Subaru earned a total of 30 vehicles on the allocation as part of the monthly allocation system. The DFW Zone offered you an additional 19 vehicles on the allocation to make sure you had enough inventory to support your sales efforts from now through the end of June. In total Bert Ogden Subaru was offered 49 vehicles on allocation #6 and you accepted 29 of the 49 vehicles offered to you on allocation #6.

If you need any additional assistance please feel free to contact me.

Thank You and Good Selling!!

Nic Youngman
District Sales Manager | c. 303.324.5207 |
Dallas Zone | Subaru of America, Inc. |
Notice: The information contained in this electronic message and in any accompanying documents (together, the "communication") contains information that is confidential, privileged or proprietary or otherwise legally exempt from disclosure. This communication is intended exclusively for the individual or entity to whom it is addressed. If the reader of this communication is not the addressee, or an employee or agent responsible for delivering it to an intended recipient, you are hereby notified that any disclosure, distribution or copying of this communication is strictly prohibited. If you have received this message in error, please notify the sender immediately by e-mail and delete all copies of the communication. Thank you.

Hearing Exhibit 111-002 SOA000302

Back to AGENDA

SUBARU

November 1, 2018

Mr. Robert C Vackar
Bert Ogden Subaru
4221 S Business 281
Edinburg, TX 78539

Dear Bob,

I wanted to give you an update on Bert Ogden Subaru sales vs. your agreed upon Min Sales target for Year 2 of our sales addendum (sales of 516 for the period – Agreement attached).

Compared with the Year 2 sales goals that began in July 2018 and continues through June 2019, Bert Ogden Subaru is behind by 60 units in the last four months.

	Sales	Target	Difference
July 2018	29	43	-14
Aug 2018	24	43	-19
Sept 2018	37	43	-6
Oct 2018	22	43	-21
	112	172	-60

As well, as of October 31st, your inventory Day Supply is high compared to the Zone. You have an 83 unit day supply (rolling 90) vs. the Zone at 69 days. For the vehicles you do sell, you are last in the entire Zone for enrolling vehicles with our Starlink telematics (55%) which is a looming safety concern for customers for whom you have not enrolled.

New car sales are at an all-time high for Subaru – in fact we just recorded our 83rd subsequent sales increase in October. The DFW Zone is up 7% YoY, whereas Bert Ogden Subaru is flat after October's results.

Important to note = your AOR is up 6% (attached), and Lexus has just past us with only two months of being in operation.

By Thanksgiving, Troy and I would like your written response on how you plan on regaining momentum with the Subaru brand. Once received, I can work with Natasha to set up a conference call to discuss the action plan.

Sincerely,

David Adams
DFW Zone Retailer Development Manager
949-636-7170

Cc: Natasha del Barrio

2600 Network Blvd #610
Frisco, TX 75034

CONFIDENTIAL

EXHIBIT
112
SOAH 608-21-0868.LIC
MVD 21-0004-LIC

BERT OGDEN (Subaru) 0768

Hearing Exhibit 112-001

Back to AGENDA

SUBARU
Subaru of America, Inc.
Central Region
500 Park Blvd., Suite 255C
Itasca, IL 60143
630-250-4740
630-285-1100 fax
www.subaru.com

August 20, 2020

PERSONAL AND CONFIDENTIAL

Sent via Certified Mail Return Receipt Requested #7015 1730 0002 2075 6390 and UPS Overnight

Mr. Robert C. Vackar
McAllen Jeep, Inc. dba Bert Ogden Subaru
4221 S. US Hwy 281
Edinburg, TX 78539

RE: Notice of Intention to Terminate Subaru Dealer Agreement

Dear Mr. Vackar:

Subaru of America, Inc. ("SOA") and McAllen Jeep, Inc. dba Bert Ogden Subaru ("Bert Ogden Subaru"), are parties to a Subaru Dealer Agreement and Standard Provisions dated July 1, 2017 ("Dealer Agreement"), pursuant to which Bert Ogden Subaru is appointed as an authorized dealer for the sale and service of Subaru motor vehicles at 4221 S. US Hwy 281, Edinburg, TX 78539. As provided in the Dealer Agreement, Bert Ogden Subaru agreed to assume certain obligations in exchange for the right to sell and service Subaru motor vehicles.

NOTICE TO DEALER: YOU MAY BE ENTITLED TO FILE A PROTEST WITH THE TEXAS MOTOR VEHICLE BOARD IN AUSTIN, TEXAS, AND HAVE A HEARING IN WHICH YOU MAY PROTEST THE PROPOSED TERMINATION OR DISCONTINUANCE OF YOUR FRANCHISE UNDER THE TERMS OF CHAPTER 2301, OCCUPATIONS CODE, IF YOU OPPOSE THIS ACTION.

Bert Ogden Subaru has failed to fulfill its obligations under the Dealer Agreement and is in material and substantial breach of the Dealer Agreement, and SOA has grounds to terminate the Dealer Agreement. As set forth below, Section 17 of the Dealer Agreement permits SOA to terminate the Dealer Agreement, the grounds for termination identified below constitute "good cause" for termination under Tex. Occ. Code §§ 2301.453 and 2301.455, and SOA has acted in good faith in issuing this notice of termination. **Accordingly, SOA hereby gives notice to Bert Ogden Subaru of its intent to terminate the Dealer Agreement, effective at 12:01 a.m. on the 61st day following Bert Ogden Subaru's receipt of this letter.**

The specific grounds for SOA's decision to terminate Bert Ogden Subaru are as follows:

I. Background

a subsidiary of Subaru Corporation

EXHIBIT
172
SOAH 608-21-0088.LIC
MVD 21-0004.LIC

In July 2017, after years of counseling Bert Ogden Subaru about the dealership's deficient sales performance and relying on Bert Ogden Subaru's promises to correct the deficiencies, SOA and Bert Ogden Subaru entered into the Sales Performance Addendum to Subaru Dealership Agreement ("2017 Addendum") (copy attached as Exhibit A). In the 2017 Addendum, Bert Ogden Subaru acknowledged the dealership's failure to meet the Subaru Minimum Standards and achieve Bert Ogden Subaru's Minimum Sales Responsibility ("MSR"), and that the failure to meet the required MSR constitutes a material breach of the Dealer Agreement. In the 2017 Addendum, SOA provided Bert Ogden Subaru with a reasonable opportunity of three years to correct the failure, and SOA and Bert Ogden Subaru agreed on the specific number of Subaru new vehicle sales Bert Ogden Subaru must achieve in order to cure the breach and comply with its obligations under the Dealer Agreement:

- Increase Subaru new vehicle sales to 50% of current MSR or a total of 430 new Subaru vehicles within the twelve-month period starting July 1, 2017 and ending on June 30, 2018
- Increase Subaru new vehicle sales to 60% of current MSR or a total of 516 new Subaru vehicles within the twelve-month period starting July 1, 2018 and ending on June 30, 2019
- Increase Subaru new vehicle sales to 70% of current MSR or a total of 602 new Subaru vehicles within the twelve-month period starting July 1, 2019 and ending on June 30, 2020.

SOA and Bert Ogden Subaru agreed that the "current MSR" would be based on Bert Ogden Subaru's MSR for April 2017 Rolling Year to Date (RYTD) (860). In addition to agreeing on a specific number of Subaru new vehicle sales, SOA and Bert Ogden Subaru further agreed that if 100% MSR for any applicable cure period was lower than 860 (i.e. if conditions changed to reduce the opportunity for Subaru new vehicle sales in the dealer's area of responsibility), Bert Ogden Subaru could cure by achieving an alternative benchmark based on the applicable percentage of the lower MSR for the applicable time period.

Bert Ogden Subaru agreed that its failure to achieve the number of the Subaru new vehicles sales during the cure periods described above shall constitute a material breach of the Dealer Agreement. As discussed below, the cure periods provided in the 2017 Addendum have expired and Bert Ogden Subaru failed to correct the sales performance deficiencies and cure the breaches identified in the 2017 Addendum.

II. Bert Ogden Subaru's Failure to Comply with Sales Performance Obligations

Section 10.1 of the Standard Provisions of the Dealer Agreement provides that:

> Dealer agrees to effectively sell Subaru Products to customers located in the Area of Responsibility. Dealer's performance of its sales obligations, without regard to its Planning Volume, will be evaluated by Distributor on the basis of such reasonable criteria as Distributor may develop from time to time, including, but not limited to, those reasonable sales objectives that Distributor may establish and a comparison of Dealer's sales performance with other Subaru dealers.

In Section 9 of the Standard Provisions of the Dealer Agreement, Bert Ogden Subaru agreed to use its best efforts to aggressively, actively, and effectively promote the sale of Subaru Products in the Area of Responsibility through regular contacts with existing and prospective owners and users of Subaru Products, including participation in promotional events in accordance with reasonable SOA Directives.

Section 17.1.24 of the Standard Provisions of the Dealer Agreement provides that the failure of Bert Ogden Subaru to substantially fulfill, based upon evaluations by SOA, its responsibilities for the sale of Subaru Products, shall be considered sufficient cause for termination. In such event, SOA will notify Bert Ogden Subaru of any such failure and will review with Bert Ogden Subaru the nature and extent of such failure and the reasons, which, in SOA's opinion, account for such failure. Thereafter, SOA will provide Bert Ogden Subaru with a reasonable opportunity to correct the failure. If Bert Ogden Subaru fails to make substantial progress toward remedying such failure before expiration of such period, SOA may terminate the Agreement.

The Standard Provisions and the 2017 Addendum are expressly incorporated into the Dealer Agreement pursuant to Section 2 of the Dealer Agreement.

Bert Ogden Subaru's sales performance for 2016 to 2020 is summarized below:

Month/Year (RYTD)[1]	Retailer Total Sales	Agreed Cure Per 2017 Addendum	Dealer's Sales Above or Below Agreed Cure	Minimum Sales Responsibility (MSR)	Dealers Sales Above or Below MSR	MSR %	Ranking
Dec. 2016	330	-	-	885	-555	37.29%	Zone: 38/39 Region: 162/163
Dec. 2017	325	-	-	855	-530	38.01%	Zone: 42/42 Region: 161/161
June 2018	327	337	-10	673	-346	48.59%	Zone: 41/43 Region: 161/163
Dec. 2018	344	-	-	780	-436	44.10%	Zone: 41/43 Region: 161/163
June 2019	338	516	-178	880	-542	38.30%	Zone: 44/44 Region: 164/164
Dec. 2019	352	-	-	946	-594	37.21%	Zone: 44/44 Region: 164/165
June 2020	358	602	-244	871	-513	41.10%	Zone: 44/44 Region: 165/165

The foregoing shows Bert Ogden Subaru has failed, and continues to fail, to fulfill its responsibilities regarding its sales performance obligations and responsibilities for the sale of Subaru Products under the Dealer Agreement. Bert Ogden Subaru is not achieving MSR, is the worst performing Subaru dealer in the state of Texas, the Dallas-Ft. Worth Zone, the Central Region, and has not made any substantial progress toward achieving MSR or the reasonable benchmarks agreed to in the 2017 Addendum.

[1] Rolling-year-to-date or RYTD means the prior 12-month period ending on the month indicated.

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For years, before and during the three-year cure period agreed to in the 2017 Addendum, SOA representatives have reviewed the nature and extent of Bert Ogden Subaru's sales performance obligations, deficiencies, and defaults with management of Bert Ogden Subaru. Bert Ogden Subaru has received regular reports and correspondence from SOA providing sales and registration data by competitive vehicle segment in order to notify Bert Ogden Subaru of its deficient sales performance. Notwithstanding SOA's counseling and efforts to support Bert Ogden Subaru, after signing the 2017 Addendum, the dealership's sales performance has declined, rather than improved, during the three-year cure period.

[No Title]

Based on SOA's evaluation and monitoring of Bert Ogden Subaru, SOA has determined that the dealership's material and ongoing failure to fulfill its sales performance obligations is the result of operational decisions and deficiencies directly within Bert Ogden Subaru's control, including, but not limited to: its failure to retain qualified management and personnel with exclusive and accountable focus on Subaru operations; its failure to adequately and effectively market and promote the sale of Subaru vehicles; and dealership management's refusal and/or unwillingness to take necessary and appropriate steps to improve the dealership's sales performance and operations in order to meet its contractual obligations.

In Section 4 of the Standard Provisions of the Dealer Agreement, Bert Ogden Subaru acknowledged the importance of customer satisfaction and that as the primary contact with the customer, Bert Ogden Subaru shall have the principal responsibility of advancing the goals of customer satisfaction. Bert Ogden Subaru agreed to use its best efforts to resolve customer issues in a fair and honest manner, keeping as the primary objective the courteous and expeditious treatment of the customer. Notwithstanding these commitments, Bert Ogden Subaru has failed to achieve acceptable levels of SOA's customer satisfaction measurement tool, Owner Loyalty Performance ("OLP"). Regarding Subaru Purchase OLP, Bert Ogden Subaru has consistently ranked among the worst performing dealers in the Dallas-Ft. Worth Zone. Poor Purchase OLP at Bert Ogden Subaru has been a continuing trend throughout the period in question, as the dealership finished with the following rankings each year:

Purchase OLP

2017	Zone 42/42
2018	Zone 44/46
2019	Zone 43/45
June 2020 YTD	Zone 44/44

It should be noted that Bert Ogden Subaru has generally performed well below average in Service OLP as well during the period in question, and currently ranks 43/44 for the Dallas-Ft. Worth Zone through June 2020 YTD.

The continued poor OLP performance of Bert Ogden Subaru during the Purchase experience is a significant contributing factor to the poor sales performance described above for the period of 2017 to the present.

These and other operational decisions and deficiencies have contributed to and culminated in Bert Ogden Subaru's failure to fulfill its sales performance obligations and responsibilities, which constitutes a substantial and material breach of the Dealer Agreement.

III. Conclusion

As a result of Bert Ogden Subaru's failure to fulfill its responsibilities regarding its sales performance obligations under the Dealer Agreement, Bert Ogden Subaru is in substantial and material breach of the Dealer Agreement, and SOA has good cause to terminate the Dealer Agreement. As stated above, Bert Ogden Subaru's Dealer Agreement will terminate at 12:01 a.m. on the 61st day after the receipt of this letter. Until this termination becomes effective, Bert Ogden Subaru remains a Subaru dealer. If at any time Bert Ogden Subaru contends that SOA is not fulfilling its obligations under the Dealer Agreement in any way, please inform me immediately in writing.

This Notice of Termination shall not be construed as a waiver of any other rights SOA may possess against Bert Ogden Subaru under any applicable agreement or law. SOA does not waive its right to raise any additional breaches of the Dealer Agreement that may exist now or in the future or to issue a Notice of Termination or Notice of Default pertaining to such breach or breaches at a later time.

Sincerely,

Casey B. Griffin
Regional Vice President

cc: Board of the Texas Department of Motor Vehicles
S. McKessey, T. Pellicori, J. Schmitt, D. Adams, D. Boyer

Enclosure: Exhibit A - 2017 Addendum

Hearing Exhibit 172-004

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	Bert Ogden OLP Rankings NPS		Bert Ogden OLP Rankings Satisfaction Score	
	Purchase	Service	Purchase	Service
2016	N/A	N/A	28/39	37/39
2017	N/A	N/A	42/42	27/42
2018	44/46	31/48	44/46	21/48
2019	44/45	31/45	43/45	33/45
2020	43/44	39/44	44/44	39/44
2021	44/44	42/44	44/44	41/44

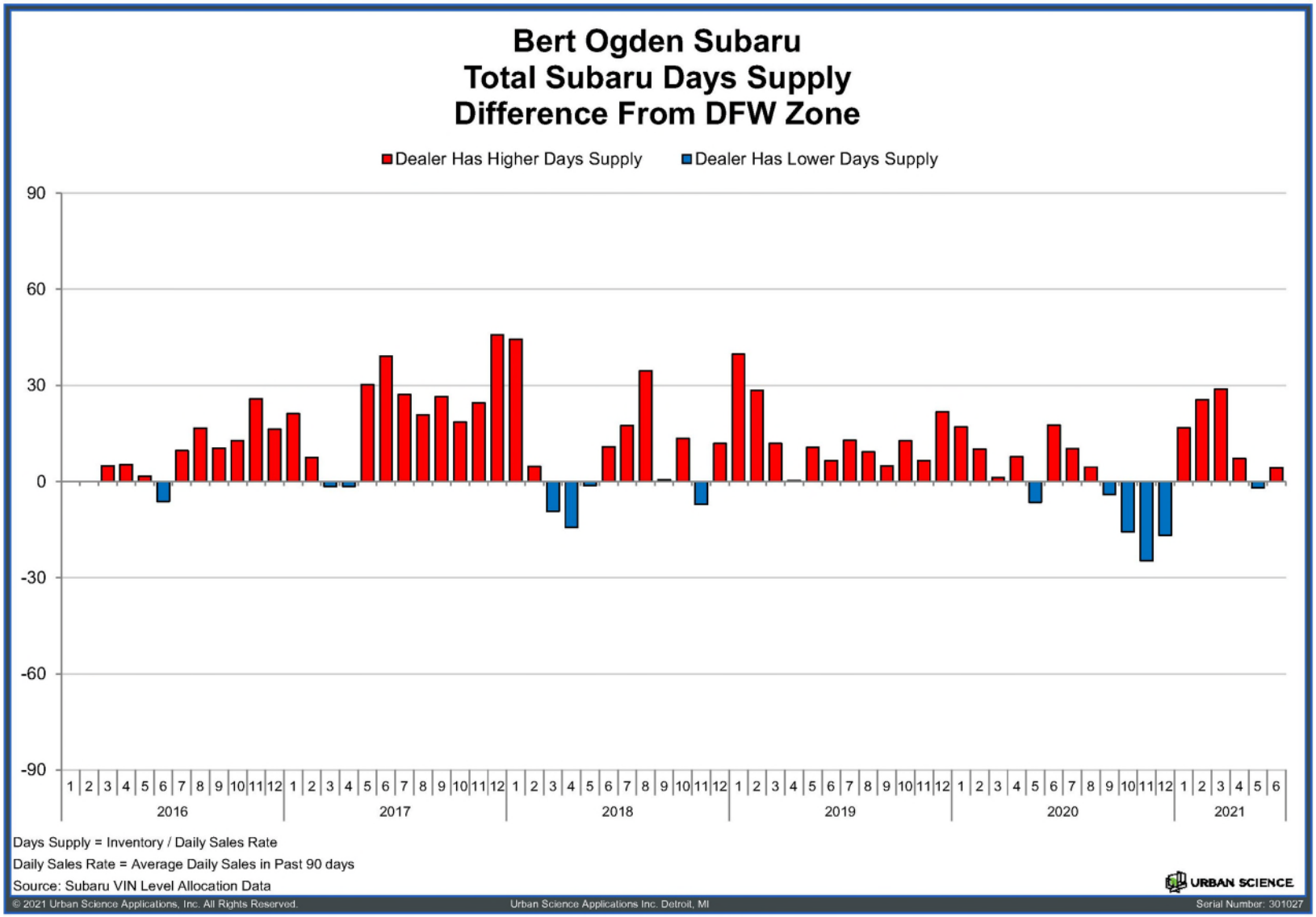
Confidential - Subject to Protective Order

EXHIBIT
42B

Hearing Exhibit 42B-001

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Subaru of America



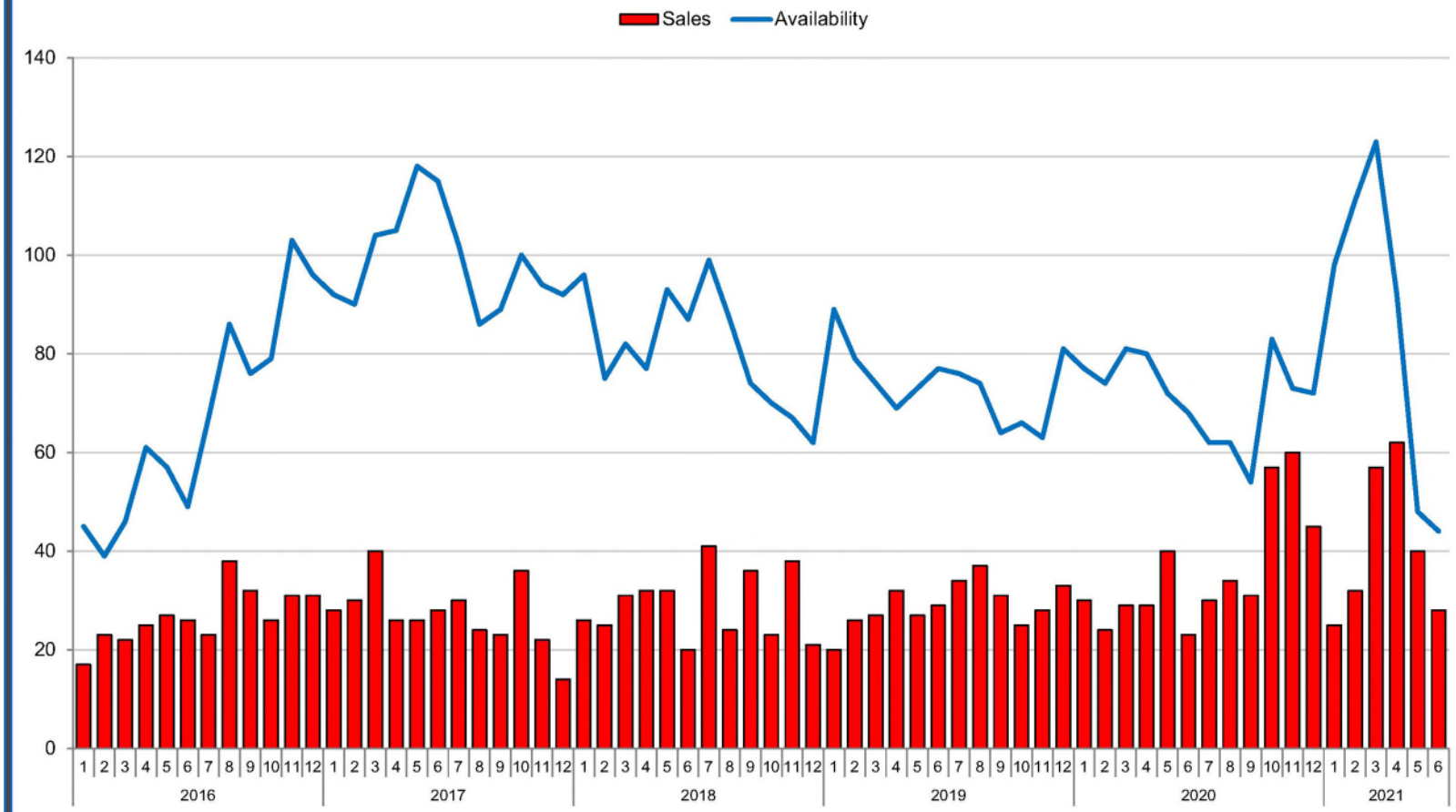
Respondent's Hearing Exhibit 186.074

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Subaru of America

Bert Ogden Subaru
Total Subaru Sales vs. Availability



Availability = Monthly Sales + Month End Inventory

Source: Subaru VIN Level Allocation Data

URBAN SCIENCE

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Urban Science Applications Inc. Detroit, MI

Serial Number: 301011

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A-43

Respondent's Hearing Exhibit 186.076

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Tr. Vol. 6 at 1471:2-18 (Jay Lytle)

Q All right. Let me -- let me ask you this: Can you remind us how was Bert Ogden's days' supply inventory relative to the other dealers in the zone?

A His days' supply was consistently higher.

Q How was Bert Ogden's sales to availability relative to the rest of the dealers in the zone?

A His sales availability was consistently lower.

Q Did you see any month where Bert Ogden did not have vehicles that it could have used to make additional sales?

A I did not.

Q How efficiently was Bert Ogden selling its inventory compared to other dealers in the zone?

A Less efficiently as relative to other dealers.

Q Do you have any reason to believe Bert Ogden did not have the inventory to grow its business?

A Absolutely not.

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Tr. Vol. 8 at 2162:16-2162:25 (Robert C. Vackar)

Q Sure. Are you aware that for 29 months in a row after you wrote the letter about the Hispanic pilot that your dealership did not budget any money for Spanish language advertising on Univision, Televisa, or Telemundo? Were you aware of that, sir?

A That's good. Yeah. Yeah, they were told not to.

Q Okay.

A Because it's ineffective. And I wasn't going to waste the money.

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Texas Department of Motor Vehicles
HELPING TEXANS GO. HELPING TEXAS GROW.

Board Meeting Date: 4/13/2023
ACTION ITEM

To: Texas Department of Motor Vehicles Board
From: Laura Moriaty, General Counsel
Agenda Item: 6
Subject: Chapter 206. Management
Amendments, §§206.94 - 206.97
Repeal, §206.98
(Relating to Advisory Committees)
(Published 12/23/22 - 47 TexReg 8520)

RECOMMENDATION

Action Item. Approval to publish the adoption of amendments and repeal in the *Texas Register*.

PURPOSE AND EXECUTIVE SUMMARY

The purpose of the amendments and repeal is to: 1) extend the expiration dates of four advisory committees; and 2) to repeal the Customer Service Advisory Committee (CSAC) and combine it with the Consumer Protection Advisory Committee (CPAC) to maximize efficiencies and expertise concerning consumer protection and customer service topics. The combined advisory committee will be renamed the Customer Service and Protection Advisory Committee (CSPAC).

FINANCIAL IMPACT

None

BACKGROUND AND DISCUSSION

The amendments and repeal include:

- §206.94 - extends the expiration date of the Motor Vehicle Industry Regulation Advisory Committee (MVIRAC) to July 7, 2027.
- §206.95 - extends the expiration date of the Motor Carrier Regulation Advisory Committee (MCRAC) to July 7, 2027.
- §206.96 -extends the expiration date of the Vehicle Titles and Registration Advisory Committee (VTRAC) to July 7, 2027.
- §206.97 - extends the expiration date of the Consumer Protection Advisory Committee (CPAC) to July 7, 2027, adds the scope of work that was performed by the Customer Service Advisory Committee (CSAC), and renames the combined advisory committee as Customer Service and Protection Advisory Committee (CSPAC).
- §206.98 - repeals the CSAC because the specific work the committee was formed to undertake will be performed by CSPAC.

If the board adopts the amendments, and repeal during its April 13, 2023, open meeting, staff anticipates:

- Publication in the April 28, 2023, issue of the *Texas Register;* and
- An effective date of May 4, 2023.

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ADOPTION OF

SUBCHAPTER E. ADVISORY COMMITTEES

§§206.94-206.97

REPEAL OF

43 TAC §206.98

INTRODUCTION. The Texas Department of Motor Vehicles (department) adopts amendments to 43 TAC §§206.94-206.97 concerning Advisory Committees. The department adopts §§206.94-206.97 without changes to the proposed text as published in the December 23, 2022, issue of the *Texas Register* (47 TexReg 8520). In conjunction with this adoption, the department is adopting the repeal of §206.98, concerning the Customer Service Advisory Committee (CSAC), which is also published in this issue of the *Texas Register*. The rule will not be republished.

REASONED JUSTIFICATION. The amendments and repeal are necessary to implement the Sunset Advisory Commission's adopted recommendation 1.7 in the Staff Report with Final Results, revised June 2019. The Sunset Advisory Commission recommended that the Department establish advisory committees to provide expertise for rulemaking and other issues, and to adopt rules regarding standard committee structure and operating criteria. The report also recommended the department establish advisory committees to provide expertise for rulemaking related to motor vehicle and carrier regulation, vehicle title and registration, consumer protection, and customer service. The amendments are necessary to extend the expiration date for four (4) advisory committees, to expand the scope of the Consumer Protection Advisory Committee (CPAC) to include the scope of work from the Customer Service Advisory Committee (CSAC), and to rename the combined advisory committee as the Customer Service and Protection Advisory Committee (CSPAC).

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Amendments to §206.94 extend the expiration date of the Motor Vehicle Industry Regulation Advisory Committee (MVIRAC) by four (4) years to July 7, 2027.

Amendments to §206.95 extend the expiration date of the Motor Carrier Regulation Advisory Committee (MCRAC) by four (4) years to July 7, 2027.

Amendments to §206.96 extend the expiration date of the Vehicle Titles and Registration Advisory Committee by four (4) years to July 7, 2027.

Amendments to §206.97 extend the expiration date of the Consumer Protection Advisory Committee (CPAC) by four (4) years to July 7, 2027, expand the scope of CPAC to include the scope from the Customer Service Advisory Committee (CSAC) to maximize efficiencies and expertise concerning consumer protection and customer service topics, and rename the combined advisory committee as the Customer Service and Protection Advisory Committee (CSPAC).

The repeal of §206.98 is necessary because the specific work that CSAC was formed to undertake will be performed by the combined CSPAC going forward.

SUMMARY OF COMMENTS.

No comments on the proposed amendments were received.

STATUTORY AUTHORITY. The department adopts amendments to §§206.94-206.97 and the repeal of §206.98 under Transportation Code §1002.001, which provides the board of the Texas Department of Motor Vehicles (board) with the authority to adopt rules that are necessary and appropriate to implement the powers and duties of the department. In addition, the department adopts amendments to §206.97 under Transportation Code §643.155, which authorizes the department to adopt rules to govern the operations of the rules advisory committee under §643.155. Transportation Code §1001.031 authorizes the department to establish advisory committees to make recommendations to the board and the executive director. Transportation Code §643.155 requires the department to establish a rules advisory

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committee to examine rules that are adopted under Transportation Code §643.153(a) and (b) and to make recommendations to the department on modernizing and streamlining the rules. Government Code §2110.005 requires a state agency to establish by rule for each advisory committee the purpose and tasks of the committee and how the committee will report to the agency. Government Code §2110.008 requires the agency to establish the duration of advisory committees by rule, including a date in rule on which the advisory committee will be abolished.

CROSS REFERENCE TO STATUTE.

Transportation Code §643.155 and §1001.031; and Government Code §2110.005 and §2110.008.

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TEXT.

SUBCHAPTER E. ADVISORY COMMITTEES

43 TAC §§206.94 - 206.97

§206.94. Motor Vehicle Industry Regulation Advisory Committee (MVIRAC).

(a) The MVIRAC is created to make recommendations, as requested by the department and board, on topics related to regulation of the motor vehicle industry.

(b) The MVIRAC shall comply with the requirements of §206.93 of this title (relating to Advisory Committee Operations and Procedures).

(c) The MVIRAC shall expire on July 7, 2027 [~~2023~~].

§206.95. Motor Carrier Regulation Advisory Committee (MCRAC).

(a) The MCRAC is created to make recommendations, as requested by the department and board, on topics related to motor carrier registration and motor carrier regulation.

(b) The MCRAC shall comply with the requirements of §206.93 of this title (relating to Advisory Committee Operations and Procedures).

(c) The MCRAC shall expire on July 7, 2027 [~~2023~~].

§206.96. Vehicle Titles and Registration Advisory Committee (VTRAC).

(a) The VTRAC is created to make recommendations, as requested by the department and board, on topics related to vehicle titles and registration.

(b) The VTRAC shall comply with the requirements of §206.93 of this title (relating to Advisory Committee Operations and Procedures).

(c) The VTRAC shall expire on July 7, 2027 [~~2023~~].

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§206.97. Customer Service and [~~Consumer~~] Protection Advisory Committee (CSPAC) [~~(CPAC)~~].

(a) The CSPAC [~~CPAC~~] is created to make recommendations, as requested by the department and board, on the following:

(1) [~~on~~] investigation and enforcement issues, including: vehicle titles and registration fraud; lemon law; the warranty performance program; and various other topics affecting consumers; and

(2) topics related to improving and enhancing customer service by the department, including, but not limited to the following: infrastructure; new customer service initiatives; policy and process improvements; and technology.

(b) The CSPAC [~~CPAC~~] shall comply with the requirements of §206.93 of this title (relating to Advisory Committee Operations and Procedures).

(c) The CSPAC [~~CPAC~~] shall expire on July 7, 2027 [~~2023~~].

REPEAL OF

SUBCHAPTER E. ADVISORY COMMITTEES

43 TAC §206.98

[~~§206.98. Customer Service Advisory Committee (CSAC)~~].

[~~(a) The CSAC is created to make recommendations, as requested by the department and board, on topics related to improving and enhancing customer service by the department, including, but not limited to: infrastructure; new customer service initiatives; policy and process improvements; and technology.~~]

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[~~(b) The CSAC shall comply with the requirements of §206.93 of this title (relating to Advisory Committee Operations and Procedures).~~]

[~~(c) The CSAC shall expire on July 7, 2023.~~]

CERTIFICATION. The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on XXXX.

Laura Moriaty, General Counsel

DRAFT

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Texas Department of Motor Vehicles
HELPING TEXANS GO. HELPING TEXAS GROW.

Board Meeting Date: 4/13/2023
ACTION ITEM

To: Texas Department of Motor Vehicles Board
From: Patricia Ueckert, Vehicle Titles and Registration Division Operations Section Director
Agenda Item: 7
Subject: Specialty Plate Design

RECOMMENDATION

Action Item. The Vehicle Titles and Registration (VTR) Division seeks board approval or denial of one plate design submitted for your consideration. The plate design is from the marketing vendor, My Plates.

PURPOSE AND EXECUTIVE SUMMARY

Sam Houston State University is a crossover plate design.

FINANCIAL IMPACT

Costs incurred by the department related to the My Plates program and an $8 administrative fee per plate are recouped from the marketing vendor, My Plates. Revenue generated from the sale of vendor specialty license plates is split between the state (General Revenue Fund) and My Plates. The details of the revenue splits can be found in Section IV (State/Contractor Revenue Sharing) of the Specialty License Plate Marketing contract.

BACKGROUND AND DISCUSSION

Statutory authority for the board to approve vendor specialty license plates and invite the public's comment on proposed vendor plate designs are in Texas Transportation Code §504.851(g) and (g-1) (1). Statutory authority for a sponsor of a specialty license plate under Texas Transportation Code Chapter 504, Subchapter J, to contract with the private vendor authorized under Texas Transportation Code §504.851 for the marketing and sale of the specialty license plate is in Texas Transportation Code §504.6011. Statutory authority for the board to approve non-profit organization specialty license plates and invite the public's comment on proposed plate designs are in Texas Transportation Code §504.801. The board's approval criteria are clarified in Texas Administrative Code §217.45 Specialty License Plates, Symbols, Tabs, and Other Devices, and §217.52 Marketing of Specialty License Plates through a Private Vendor.

The vendor contract (Statement of Work paragraph #2, Marketing Services) specifies that following the board's contingent approval of a plate, the vendor must get at least 200 commitments within six months of the approval for a plate to be produced (*existing* plates must also maintain 200 registrations to stay in the program). My Plates' procedure is to first offer a plate to the public to register their interest. Following the board's contingent approval, My Plates then offers a plate online for prepaid orders and confirms when 200 prepaid orders are achieved.

TxDMV's procedure is to invite comments on all proposed plates ahead of the board's review. The department's intent is to determine if there are any unforeseen public concerns about a plate design. The department publishes a 10-day

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"like/dislike/comment-by-email" survey, called an eVIEW, on its website. Although the survey counts the public's "likes" and "dislikes," it is unscientific and not used as an indicator of a plate's popularity.

The plate design listed below was presented to the public in a February 2023 eVIEW. No negative comments were received. The count of the public's "like/dislikes" are noted below.

Sam Houston State University	State Plate	Crossover
478 people liked this design and 220 did not		

Sam Houston State University (Crossover)



TEXAS SPECIALTY PLATE BUSINESS

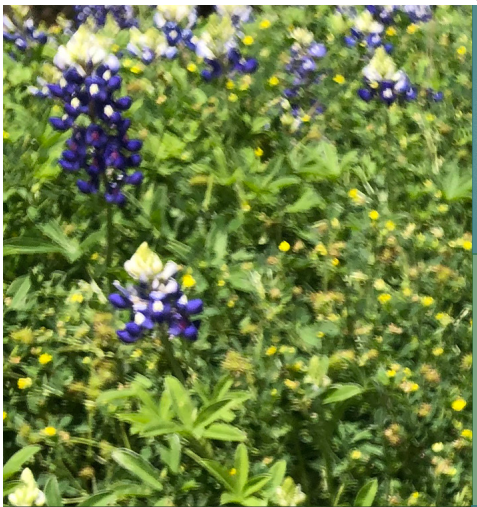
Vehicle Titles and Registration Division
Special Plates Unit (5FTEs) 04/23

VTR Director
Annette Quintero

APR. 2023

Texas Department of Motor Vehicles





SLP AVAILABLE	519
MILITARY AND DV	196
RESTRICTED USE	59
STATE SPECIALTY	126
VENDOR SPECIALTY	138

TOP TEN DATA 02-2023



CHARITY

	LINKED	UNLINKED	TOTAL
1. ANIMAL FRIENDLY	7,356	271	7,627
2. CONSERVATION: HORNED LIZARD	6,272	249	6,521
3. STATE OF THE ARTS	4,485	684	5,169
4. CONSERVATION: BLUEBONNET	4,571	224	4,795
5. CONSERVATION: WHITE-TAILED DEER	3,220	157	3,377
6. TEXAS A & M UNIVERSITY	2,199	046	2,245
7. BIG BEND NATIONAL PARK	1,992	088	2,080
8. CONSERVATION: HUMMINGBIRD	1,936	122	2,058
9. CONSERVATION: LARGE MOUTH BASS	1,911	124	2,035
10. CONSERVATION: CAMPING	1,855	123	2,978



VENDOR

1. CLASSIC BLACK	58,695	10,909	69,604
2. LARGE STAR WHITE/BLACK	39,922	6,801	46,723
3. TEXAS BLACK 1845	17,401	4,031	21,432
4. LONE STAR BLACK	14,141	3,113	17,254
5. CARBON FIBER	12,459	2,944	15,403
6. CLASSIC BLACK - SILVER	5,638	2,279	7,917
7. LONE STAR 1836	5,081	876	5,957
8. LONE STAR BLK/SILV	4,201	1,029	5,230
9. TEXAS VINTAGE BLACK	4,167	705	4,872
10. TEXAS A&M (MAROON)	4,136	592	4,728



MILITARY

1. DISABLED VETERAN	209,034	7,355	216,389
2. DV U.S. ARMY	51,542	1,964	53,506
3. DV U.S. MARINE CORPS	28,272	923	29,195
4. DV U.S. AIR FORCE	23,203	782	23,985
5. DV U.S. NAVY	20,548	710	21,258
6. DV BRONZE STAR MEDAL	14,262	398	14,660
7. PURPLE HEART	13,281	362	13,643
8. MERITORIOUS SERVICE MEDAL	12,760	535	13,295
9. U.S. MARINE CORPS	12,371	510	12,881
10. U.S. ARMY	10,585	478	11,063

SPECIAL PLATES UNIT CUSTOMER SERVICE STATISTICS FY 2023

39,617	12,227	33	6,205	1,506	21	2,260
Personalized Plate Applications Reviewed (96% Approved)	Telephone Calls	Walk-in Customers	Emails	Refunds	Public Information Open Records	Correspondence (Including Plate A

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Texas Department of Motor Vehicles
HELPING TEXANS GO. HELPING TEXAS GROW.

Board Meeting Date: 4/13/2023
BRIEFING ITEM

To: Texas Department of Motor Vehicles Board
From: Keith Yawn, Government & Strategic Communications Division Director
Agenda Item: 8
Subject: 88th Legislative Session Update

RECOMMENDATION

Briefing Only.

PURPOSE AND EXECUTIVE SUMMARY

Government and Strategic Communications staff will provide an overview of legislative activity related to department operations in the first half of the 88th Regular Legislative Session.

FINANCIAL IMPACT

No impact.

BACKGROUND AND DISCUSSION

The 88th Texas Legislature convened in regular session on January 10, 2023, and will adjourn on May 29, 2023. By the last week in March more than 8,000 pieces of legislation had been filed for consideration in the House and Senate chambers, including the General Appropriations Act (biennial statewide budget) and the supplemental appropriations bill. Department staff is actively tracking more than 500 individual bills, including more than 100 with direct primary impact to the department's core operational programs.

Three bills would enact recommendations approved by the Board last fall. Senate Bill (SB) 247 repeals the Honorary Consul specialty license plate, a change encouraged by the United States Department of State; SB 1182 contains all Board recommendations related to registration and license plate programs; and House Bill 5269 contains all Board recommendations related to title programs.

The briefing will include an update on the status of department budget and funding requests for the 2024-25 biennium, beginning on September 1, 2023.

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Texas Department of Motor Vehicles
HELPING TEXANS GO. HELPING TEXAS GROW.

Board Meeting Date: 4/13/2023
BRIEFING

To: Texas Department of Motor Vehicles Board
From: Glenna Bowman, Chief Financial Officer and John Ralston, Director of Budget & Forecasting
Agenda Item: 9.A
Subject: Semi-Annual FY 2023 Financial Report

RECOMMENDATION

Briefing item only.

PURPOSE AND EXECUTIVE SUMMARY

Attached is the TxDMV FY 2023 Financial Report on the first six months (September 1, 2022–February 28, 2023) of the fiscal year. The report includes statistical and detailed information on revenues, the TxDMV Fund 0010 balance, actual expenditures, and outstanding obligations.

Highlights include:

- TxDMV collected $954.3 million in revenue in all funds as of February 28, 2.5% more than FY 2022 collections for the same time period.
- TxDMV Fund 0010 revenue collections total $88.6 million, a 7.1% increase compared to FY 2022.
- The adjusted balance for TxDMV Fund 0010 as of February 28, 2023, is $141.0 million.
- Actual expenditures and outstanding obligations for all funds total $139.2 million ($75.7 million in actual expenditures and $63.5 million in outstanding obligations).
    - TxDMV Fund 0010 actual expenditures total $74.9 million, with $46.8 million in outstanding obligations as of February 28.
    - General Revenue Fund 0001 actual expenditures total $798,000, with $16.7 million in outstanding obligations as of February 28. General Revenue obligations are primarily for Motor Vehicle Crime Prevention Authority (MVCPA) activities.
- In the first six months of FY 2023, the department collected sufficient revenue to support its year-to-date actual expenditures and outstanding obligations.

FINANCIAL IMPACT

TxDMV is self-supporting and funds all its expenditures from revenues deposited to TxDMV Fund 0010, except the MVCPA, which is funded from fees deposited to General Revenue Fund 0001 for that purpose. The department also deposits revenue into State Highway Fund 0006 and General Revenue Fund 0001 for other state programs.

BACKGROUND AND DISCUSSION

See attached report.

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Texas Department *of* Motor Vehicles

HELPING TEXANS GO. HELPING TEXAS GROW.

FY 2023 Financial Summary

Semi-Annual Report

(September 1, 2022–February 28, 2023)

Finance and Administrative Services Division

April 13, 2023

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Texas Department *of* Motor Vehicles

HELPING TEXANS GO. HELPING TEXAS GROW.



FY 2023 Financial Summary
Semi-Annual Report

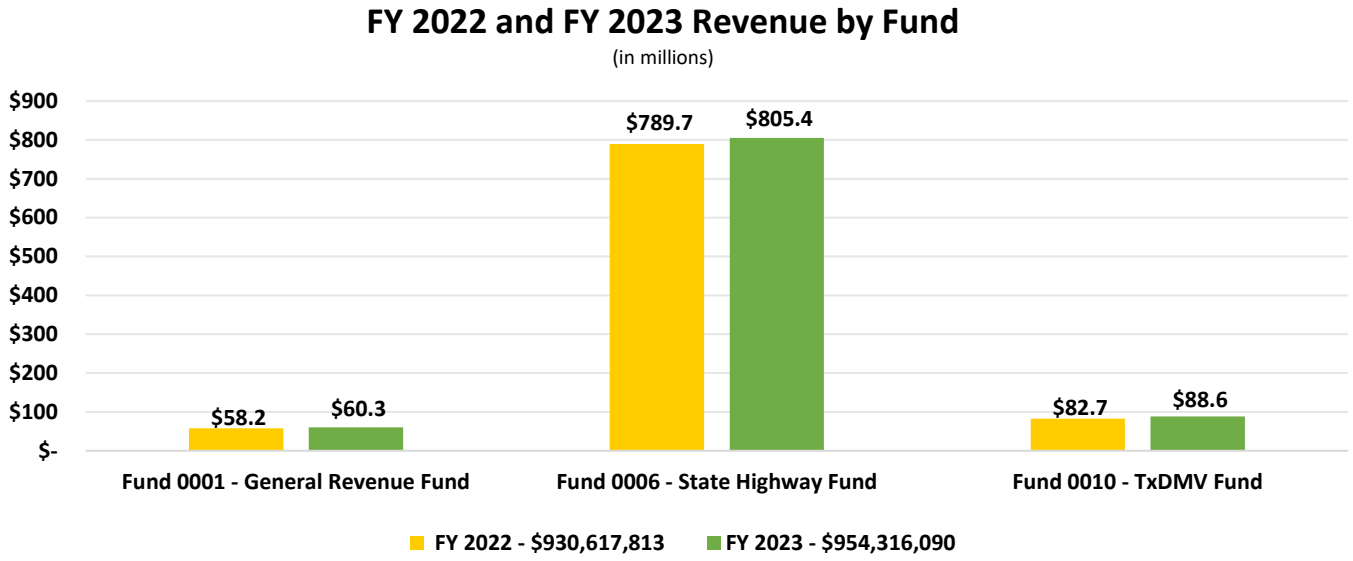
(September 1, 2022 through February 28, 2023)

April 13, 2023

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FY 2022 and FY 2023 Revenues - All Funds

September 1 through February 28



The Texas Department of Motor Vehicles (TxDMV) collected $954.3 million through February 28, 2023. This is 2.5% more than FY 2022 collections. FY 2022 and FY 2023 revenue deposits for all funds by revenue category are shown in the chart below.

FY 2022 and FY 2023 Revenue by Category - All Funds

Revenue Category	FY 2022 Actual	FY 2023 Actual	Variance	% Difference
Motor Vehicle Certificates of Title	$ 44,244,401	$ 44,534,483	$ 290,082	0.7%
Motor Vehicle Registration	769,420,210	783,705,579	14,285,369	1.9%
Motor Carrier - Oversize/Overweight	77,107,892	81,780,169	4,672,276	6.1%
Motor Carrier Credentialing	4,378,813	4,227,128	(151,685)	(3.5%)
Motor Vehicle Business Licenses	3,668,205	3,623,438	(44,768)	(1.2%)
Miscellaneous Revenue	5,845,368	9,957,102	4,111,733	70.3%
Processing and Handling Fee	25,952,922	26,488,192	535,269	2.1%
Total	**$ 930,617,813**	**$ 954,316,090**	**$ 23,698,278**	**2.5%**

In FY 2023, as compared to the same period in FY 2022, the state has shown a steady growth pattern in almost all sectors, resulting in increases in all categories of revenue but two (motor carrier credentialing and motor vehicle business licenses). Decreased motor vehicle business license revenue can be attributed to the motor vehicle industry at large realizing the effects of supply-chain issues and the global chip shortage. This has led to a lack of motor vehicle inventory and increased competition for available inventory. As a result, the department has received fewer applications for motor vehicle industry licensure. Motor carrier credentialing revenue is down due to a decrease in the number of credentialing applications received by the department, although the total number of vehicles credentialed across all the applications collectively is about the same year-over-year.

TxDMV will continue to monitor the effects of these factors throughout FY 2023.

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FY 2023 Projected versus Actual Revenues - All Funds

September 1 through February 28

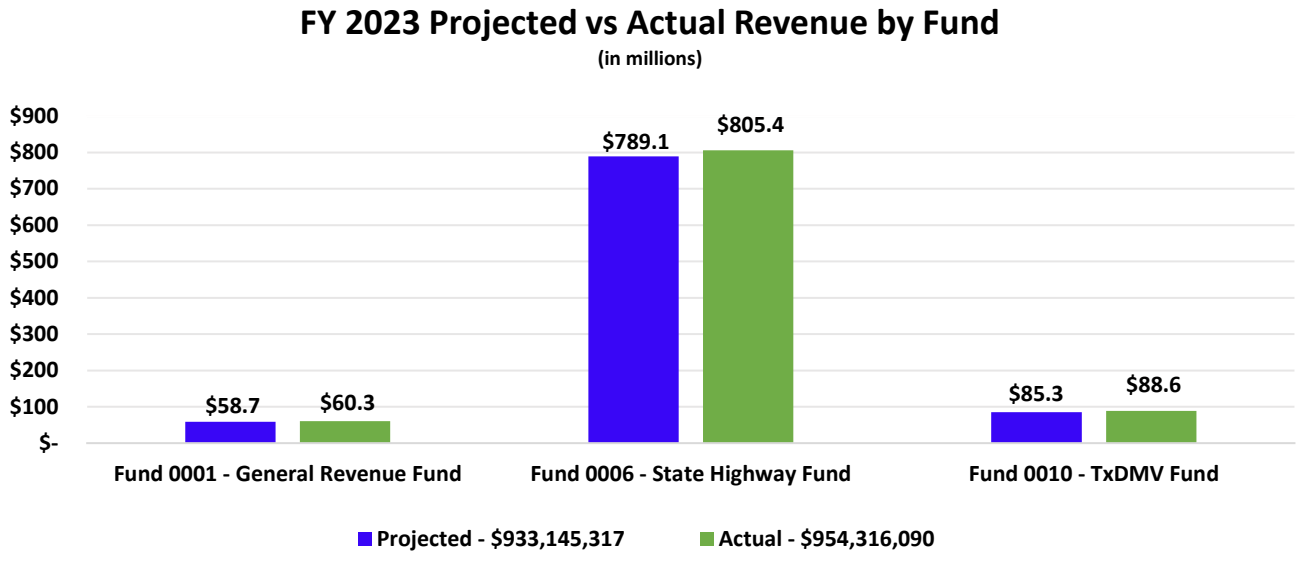
FY 2023 Projected vs Actual Revenue by Category

Revenue Category	FY 2023 Projected	FY 2023 Actual	Variance	% Difference
Motor Vehicle Certificates of Title	$ 45,616,192	$ 44,534,483	$ (1,081,709)	(2.4%)
Motor Vehicle Registration	767,220,727	783,705,579	16,484,852	2.1%
Motor Carrier - Oversize/Overweight	77,721,349	81,780,169	4,058,820	5.2%
Motor Carrier Credentialing	4,378,668	4,227,128	(151,540)	(3.5%)
Motor Vehicle Business Licenses	3,484,737	3,623,438	138,700	4.0%
Miscellaneous Revenue	8,770,500	9,957,102	1,186,602	13.5%
Processing and Handling Fee	25,953,145	26,488,192	535,047	2.1%
Total	**$ 933,145,317**	**$ 954,316,090**	**$ 21,170,773**	**2.3%**

Year-to-date revenue for FY 2023 is 2.3% ($21.2 million) above projections. Registration, oversize/overweight, business licenses, miscellaneous, and processing and handling fee revenues are all above projections. The variance in Miscellaneous revenue of 13.5% ($1.2 million) is mostly due to higher-than-expected motor vehicle dealer civil penalty collections.

Motor vehicle certificates of title revenue is 2.4% ($1.1 million) below projections mostly attributable to a lower-than-expected number of rebuilt-salvage title applications. Motor carrier credentialing revenue is 3.5% ($151,540) below projections.

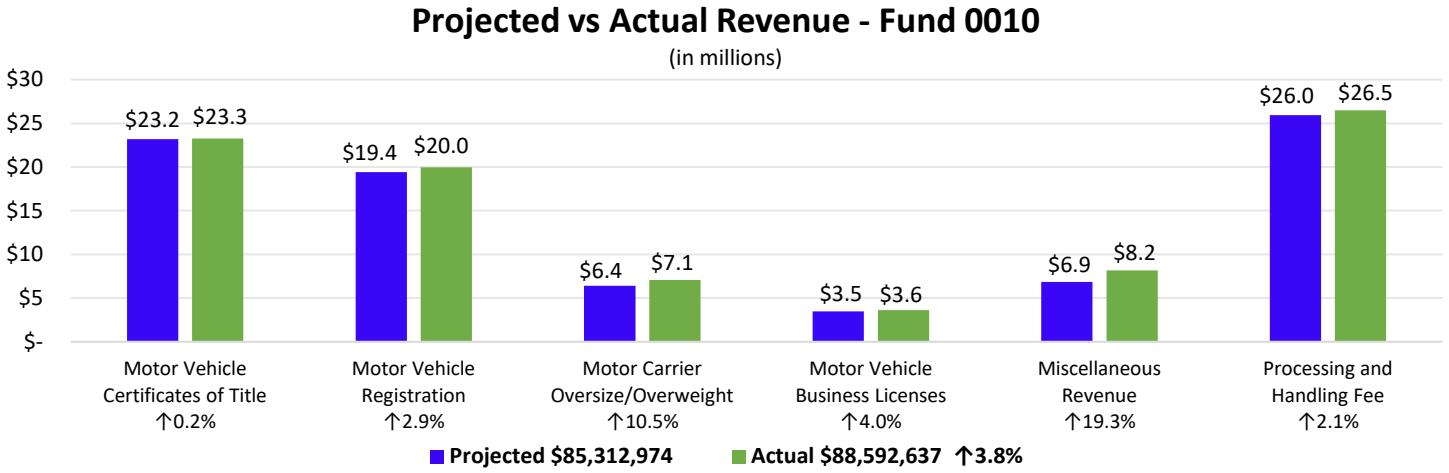
Total projected and actual revenues by fund are shown in the chart below.



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FY 2023 TxDMV Fund 0010 Revenue Highlights

September 1 through February 28



- TxDMV Fund 0010 revenue is 3.8% ($3.3 million) above projections for FY 2023.
- Motor Vehicle Registration revenue is 2.9% over projections, mostly due to stronger-than-expected vendor-plates sales.
- Motor Carrier Oversize/Overweight is 10.5% over projections reflecting an increase in the number of permits being issued.
- Motor Vehicle Business License revenue is 4.0% over projections due to a higher-than-expected number of dealer licenses being issued year-to-date.
- Miscellaneous revenue is 19.3% over projections, mostly attributable to higher-than-expected collections of motor vehicle dealer civil penalties.

FY 2022 and FY 2023 Actual Revenue - Fund 0010

Revenue Category	FY 2022 Actual	FY 2023 Actual	Variance	% Difference
Motor Vehicle Certificates of Title	$ 22,694,376	$ 23,262,806	$ 568,430	2.5%
Motor Vehicle Registration	19,710,724	19,967,201	256,477	1.3%
Motor Carrier Oversize/Overweight	6,723,618	7,075,775	352,157	5.2%
Motor Vehicle Business Licenses	3,668,205	3,623,438	(44,768)	(1.2%)
Miscellaneous Revenue	4,000,128	8,175,226	4,175,098	104.4%
Processing and Handling Fee	25,952,922	26,488,192	535,269	2.1%
Total	**$ 82,749,974**	**$ 88,592,637**	**$ 5,842,663**	**7.1%**

- Total TxDMV Fund 0010 revenue is 7.1% ($5.8 million) higher than the same period in FY 2022. The increase in Motor Vehicle Certificates of Title revenue is mostly due to higher collections of the delinquent title transfer penalty. The increase in Motor Vehicle Registration revenue is mostly attributable to strong vendor-plates sales. The increase in Miscellaneous revenue is mostly due to higher collections of motor vehicle dealer civil penalties and an increase in interest rates on the fund balance.

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FY 2023 Appropriations and Expenditures by Fund

September 1 through February 28

For FY 2023, TxDMV was appropriated $151,124,715 for department operations. Of this, $136,145,110 is from TxDMV Fund 0010 and $14,979,605 is from General Revenue Fund 0001 for use by the Motor Vehicle Crime Prevention Authority. An additional $46,546,467 from past-year appropriations and adjustments was also available for use, as well as $14,186,469 for employee benefits. FY 2023 expenditures totaled $75,721,114 as shown in last column of the table immediately below.

	Fund 0010 Sep-Feb FY 23		Fund 0001 Sep-Feb FY 23	Grand Total Sep-Feb FY 23
Operating Expenditures				
Salaries and Wages	$ 21,143,610		$ 164,625	$ 21,308,235
Other Personnel	$ 692,663		$ 1,563	$ 694,226
Professional Fees	$ 10,986,043		$ 564,497	$ 11,550,540
Fuels & Lubricants	$ 20,150		$ -	$ 20,150
Consumables	$ 560,290		$ 99	$ 560,389
Utilities	$ 2,001,931		$ 1,368	$ 2,003,298
Travel	$ 143,473		$ 6,801	$ 150,274
Rent - Building	$ 462,028		$ -	$ 462,028
Rent - Machine and Other	$ 93,662		$ 1,497	$ 95,159
Other Operating	$ 32,295,428	(1)	$ 4,305	$ 32,299,732
Grants	$ -		$ 7,500	$ 7,500
Other Capital	$ 103,962		$ -	$ 103,962
Total Operating Expenditures	**$ 68,503,240**		**$ 752,254**	**$ 69,255,494**
Fringe Benefits				
Retirement	$ 1,986,314		$ 15,722	$ 2,002,036
Group Insurance	$ 2,803,370		$ 17,184	$ 2,820,554
OASI (Old Age and Survivor's Insurance)	$ 1,600,323		$ 11,938	$ 1,612,260
Unemployment Reimbursement to GR	$ 674		$ -	$ 674
Benefit Replacement Pay	$ 30,096		$ -	$ 30,096
Total Fringe Benefits	**$ 6,420,776**		**$ 44,843**	**$ 6,465,620**
Total Expenditures	**$ 74,924,016**		**$ 797,097**	**$ 75,721,114**

TxDMV Fund 0010 Balance

FY 2023 TxDMV Fund 0010 revenue collections exceeded expenditures and encumbrances by $13.7 million, increasing the adjusted fund balance to $141.0 million.

FY 2023 Beginning Balance	$ 174,097,465	
Revenue		
Motor Vehicle Certificates of Title	$ 23,262,806	
Motor Vehicle Registration	$ 19,967,201	(1)
Motor Carrier - Oversize/Overweight	$ 7,075,775	
Motor Vehicle Business Licenses	$ 3,623,438	
Miscellaneous Revenue	$ 8,175,226	
Processing and Handling Fee	$ 26,488,192	(2)
Total Revenue	**$ 88,592,637**	
Total Fund 0010 Expenditures	**$ 74,924,016**	
Ending Fund Balance	**$ 187,766,085**	
Adjustment for Encumbrances	**$ 46,766,396**	
Adjusted Fund Balance	**$ 140,999,689**	

FY 2023 Revenues & Expenditures



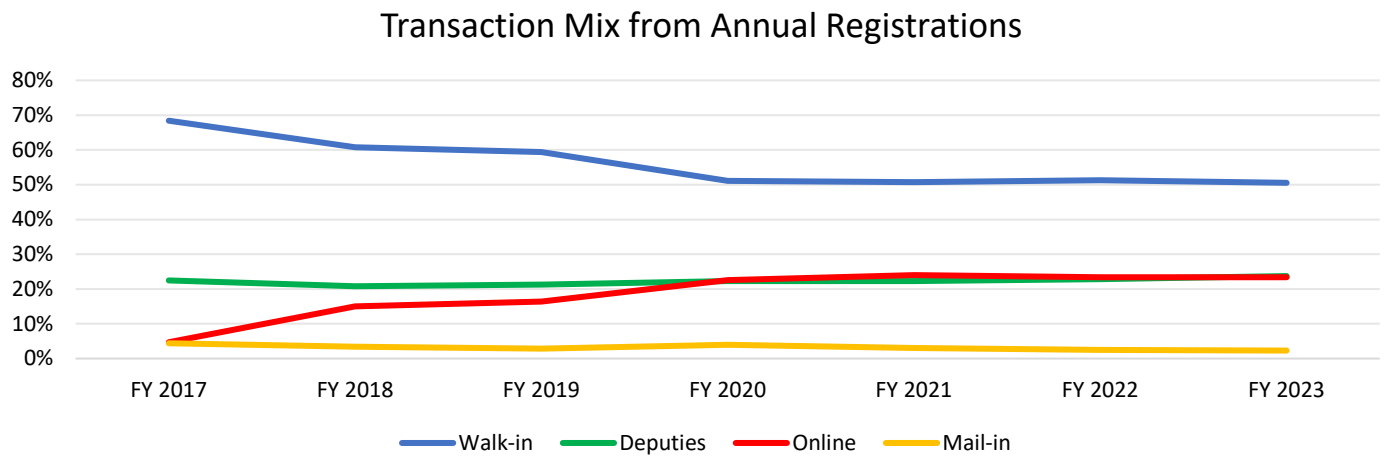
Footnotes:

(1) Included in Motor Vehicle Registration fees are MyPlates revenue collections of $4,595,583; and included in Other Operating expenditures are MyPlates expenditures of $4,477,435.

(2) Processing and Handling fee revenue does not include the portion of the fees retained for administrative expenses by the counties or Texas.gov, per TxDMV board rule.

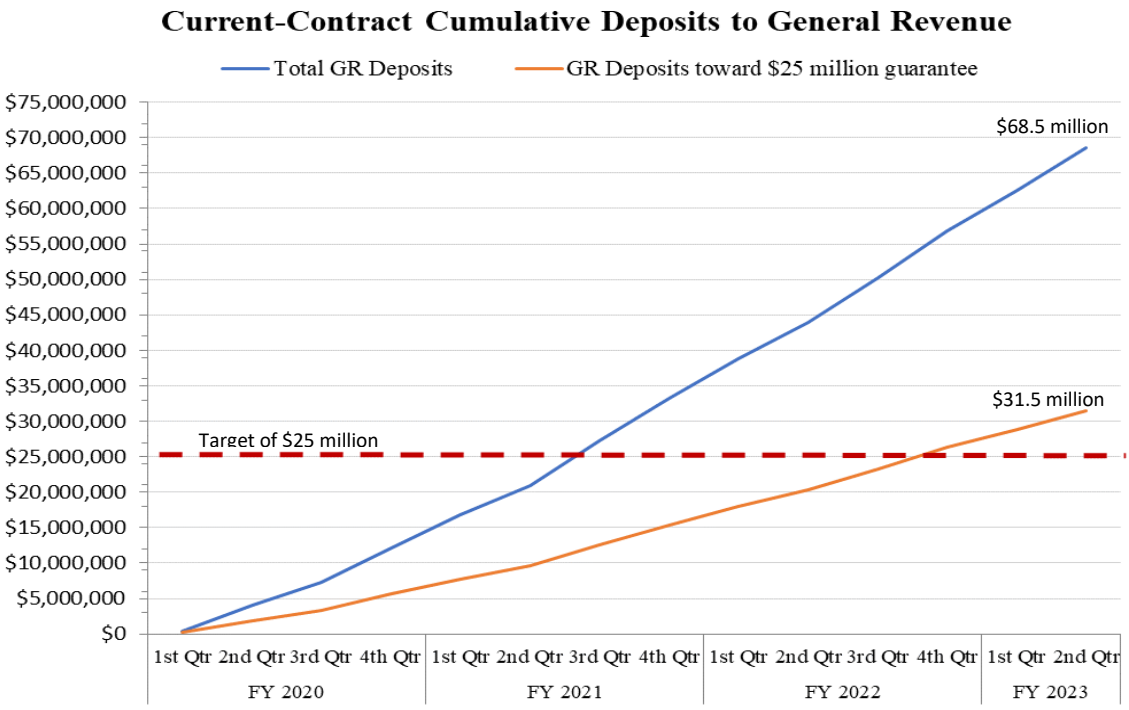
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Processing and Handling Fee



- As of February 28, 2023, a majority (50.5%) of annual-registration transactions were processed at county offices.
- The percentage of online registration renewals decreased slightly year-over-year, accounting for 23.4% (2.7 million) of the 11.7 million total transactions in FY 2023 compared to 23.7% for the same period in FY 2022.
- Deputy and mail-in percentages have remained relatively constant since FY 2017, and are at 23.7% and 2.3%, respectively, for FY 2023.

Vendor Plates

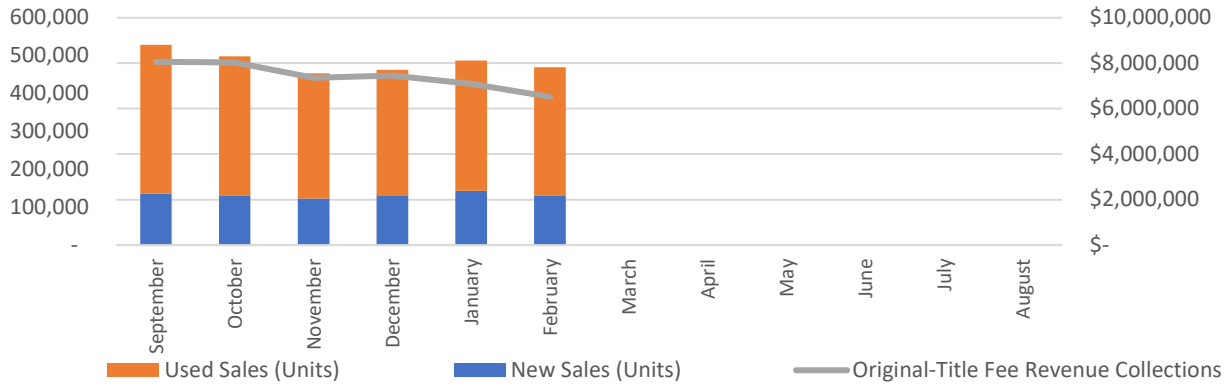


- General Revenue Fund 0001 deposits associated with the MyPlates contract from November 19, 2019, to February 28, 2023, totaled $68.5 million.
- $31.5 million of the revenue counted toward the contract's $25 million guarantee.
- Since the effective date of the current contract, new orders accounted for 43.1% of the Fund 0001 mix, and renewals accounted for 56.9%.

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Motor Vehicle Certificates of Title

Monthly Auto Sales and Original-Title Fee Revenue Collections

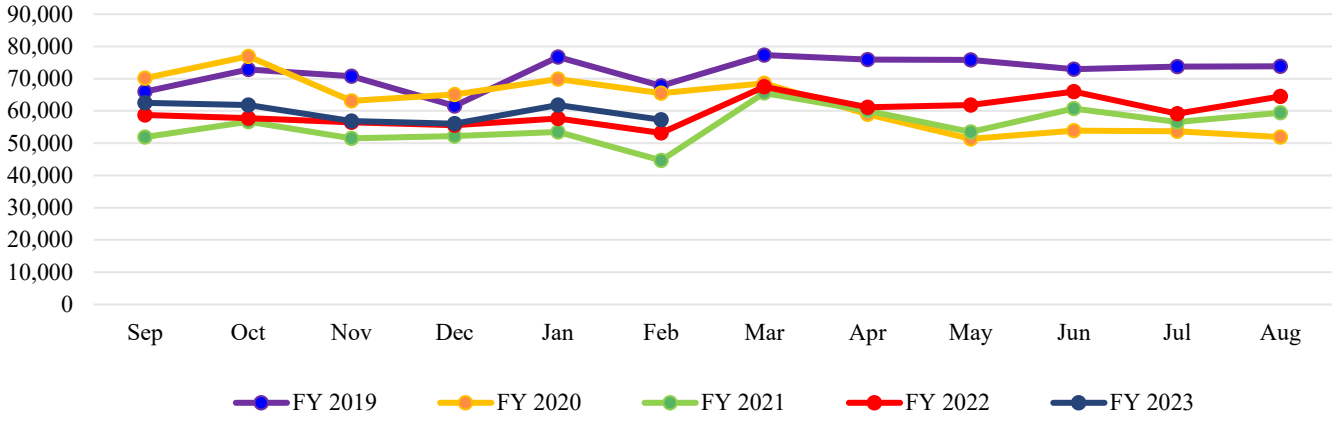


- Original-title fees are the largest component of Certificates of Title revenue. In FY 2023, TxDMV has collected revenue from the issuance of about 3.1 million original titles. Original-title issuance is driven by new- and used-vehicle sales; original-title revenue collections are reflected in the gray trend line above. FY 2023 saw a slight decrease in overall vehicle sales as compared to the same period in FY 2022.

- Auto sales year-to-date in FY 2023 have decreased 0.3% from FY 2022, with used-vehicle sales down 1.8% and new-vehicle sales up 3.9%.

Motor Carrier Oversize/Overweight Permits

Monthly Oversize/Overweight Permit Issuance



- The number of permits issued in FY 2023 is 356,380 compared to 339,287 for the same period in FY 2022, an increase of 5.0%. Increased activity in the oil-and-gas and construction sectors has continued to affect the issuance of motor-carrier permits, resulting in a steady increase in oversize/overweight fee deposits since FY 2022.

- As shown in the trend lines in the graph above, FY 2023 saw an increase in permit issuance as compared to the same period in FY 2022.

- Revenue in this category is expected to see an overall year-over-year increase in FY 2023.

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FY 2023 Financial Summary as of February 28

FY 2023 Highlights

- The adjusted FY 2023 budget as of February 28, 2023, was $211.9 million. This amount includes the original baseline total as approved by the Legislature during the 87th legislative session and adjustments as shown in the table below.

FY 2023 Budget	Amount
Original Baseline Appropriations	$ 150,871,677
Unexpended Balances from FY 2022 and Other Adjustments	$ 46,799,005
Benefit Costs	$ 14,186,969
Adjusted Appropriations	$ 211,857,652

- The baseline total of $150.9 million provides funding for 808.0 full-time equivalents (FTEs), ongoing operating costs, and FY 2022 funding for capital projects.

- The $46.8 million in unexpended balances and other adjustments as of February 28, 2023, was a combination of the continuation of capital projects funded in FY 2022 and brought forward to FY 2023 and the carryforward of supplemental and operating appropriations. Also included is an increase in My Plates for corresponding expenditures.

- The House Bill 2 supplemental appropriations originally funded in FY 2021 and now brought forward to FY 2023 include FY 2023 amounts for the implementation of an accounts-receivable system ($3.2 million); development of the webSALVAGE application ($3.0 million); and one-time programming costs to implement the provisions of Senate Bill 1064 relating to the extended registration of certain county fleet vehicles ($250,000).

- Capital project carryforwards from FY 2022 total $20.4 million and is for Automation projects ($12.4 million), County Technology ($3.2 million), Headquarters Maintenance ($2.7 million), and IRP Upgrade ($1.3 million), Technology Growth & Enhancement ($255,000), and Regional Service Center Maintenance ($250,000), and ITD Cybersecurity ($302,000).

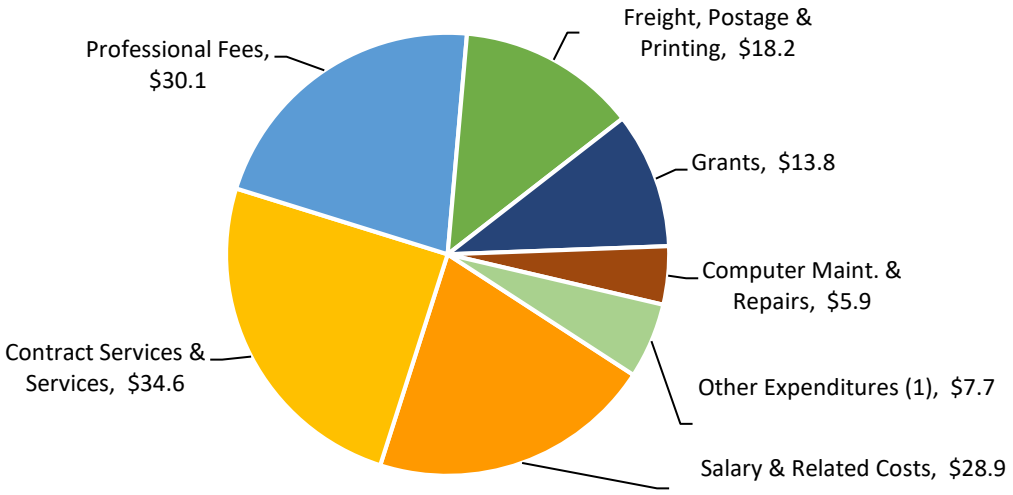
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FY 2023 Financial Summary as of February 28

September 1 through February 28

- Expenditures and outstanding obligations as of February 28, 2023, totaled $139.2 million ($75.7 million in expenditures and $63.5 million in encumbrances).

FY 2023 Expenditures and Encumbrances by Category - All Funds
(in millions)

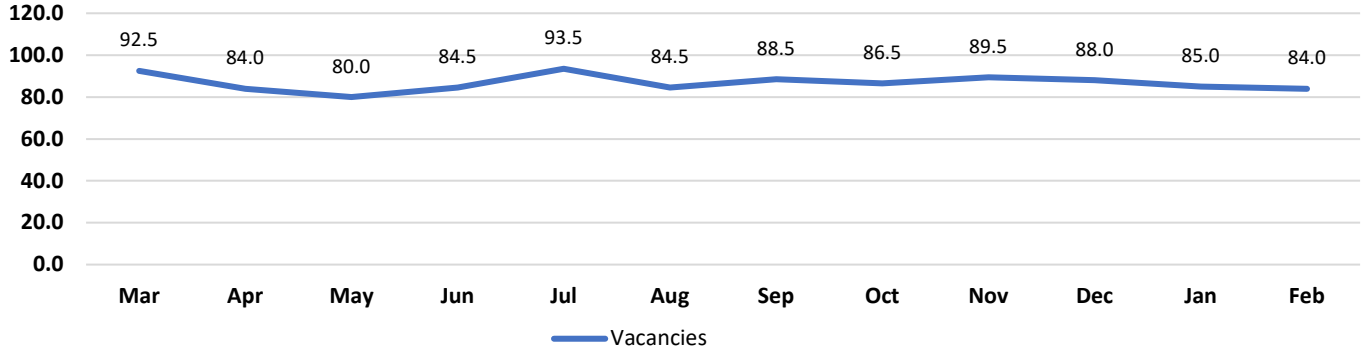


(1) Other Expenditures includes: Online Service Fees ($2.6 million), Rents/Utilities ($3.8 million), Other Expenses ($693,000), Travel/Training ($371,000), and Capital Equipment ($263,000).

Full-Time Equivalents

- The FY 2023 authorized FTE cap is 808.0. The authorized cap is the same as FY 2022 as approved in the General Appropriations Act.
- Overall, vacancies have remained constant throughout FY 2022 and the first six months of FY 2023.

Monthly Vacancies - Most Recent 12-Months



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FY 2023 Financial Summary as of February 28

Capital Budget and Projects

Capital Budget Financial Status

	Revised Budget	Expenditures	Encumbrances	Available Budget
TxDMV Automation System	$ 12,393,614	($2,134,342)	($4,937,361)	$ 5,321,911
Other Info Resources Projects	$ 22,047,253	($6,891,625)	($11,114,667)	$ 4,040,960
Other Capital Projects	$ 3,288,898	($218,879)	($266,769)	$ 2,803,250
Grand Total, Capital Budget	**$ 37,729,765**	**($9,244,847)**	**($16,318,797)**	**$ 12,166,121**

- The Revised Capital Budget for FY 2023 includes $20.5 million carried forward from FY 2022, $16.5 million in new appropriations, and $791,000 in adjustments.

TxDMV Automation System Projects

Project Name	FY 2023 Budget	FY 2023 Obligations	Status
Cybersecurity	$ 404,665	$ 150,815	In progress. This project addresses two solutions - a privileged access management solution and a security information event management solution.
Call Center Upgrades	$ 58,960	$ 58,960	Project completed and final invoices in process.
RTS Support	$ 5,644,380	$ 5,641,944	Project ongoing.
RTS Batch Cycle	$ 37,861	$ -	Project completed.
Statewide webDEALER Adoption	$ 985,217	$ 984,665	In progress. Additional releases for the application scheduled in May 2023 and August 2023.
Texas by Texas	$ 202,692	$ -	Project completed.
MCCS Rewrite	$ 235,318	$ 235,318	Scope of Work has been drafted and currently under review.
Reserve/unobligated	$ 4,824,521	$ -	For reserve/unobligated costs.
	$ 12,393,614	**$ 7,071,703**	

- The total FY 2023 budget for the TxDMV Automation System Projects as of February 28, 2023 is $12.4 million.
- Expenditures and encumbrances total $7.1 million. The majority of these costs are for Registration and Title System (RTS) Defects ($5.7 million); the Statewide webDEALER Adoption project ($985,000); and the Motor Carrier Credentialing System (MCCS) upgrade ($235,000)

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FY 2023 Financial Summary as of February 28

Other Information Resources Projects

Project Name	FY 2023 Budget	FY 2023 Obligations	Status
County Technology	$ 8,172,117	$ 4,917,952	Major items in progress include refresh of computer equipment in Tax Assessor-Collector offices; upgrades of connectivity with Tax Assessor-Collector offices; and implementation of credit cards in Regional Service Centers.
Growth & Enhancement	$ 1,062,569	$ 660,922	This project includes technology enhancements for Building 6.
Data Center Services	$ 10,112,632	$ 10,112,632	This project provides for annual Data Center Services costs.
PC Replacement	$ 327,917	$ 171,787	Provides funding for annual computer refresh.
Cybersecurity	$ 302,017	$ 80,000	In progress. Includes security audit contract and projects to develop a privileged access management solution and a security information event management solution.
IRP Upgrade	$ 1,290,000	$ 1,283,000	Vendor contract completed and project is in progress.
CVIEW Update	$ 780,000	$ 780,000	Vendor contract completed and project is in progress.
	$ 22,047,253	**$ 18,006,293**	

- Data Center Services (DCS) provides management of applications, hardware, and technology services for TxDMV and is the largest single component of Other Information Resources Projects ($10.1 million).
- Obligations in County Technology Replacement include routine replacement of laptops and desktops for the technology refresh program.
- The upgrade of the International Registration Plan (IRP) application was created in FY 2022 and brought forward to FY 2023.
- The CVIEW Update is a new project created in FY 2023 and all costs will be reimbursed by a Federal grant.

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FY 2023 Financial Summary as of February 28

Other Capital Projects

Project Name	FY 2023 Budget	FY 2023 Obligations	Status
RSC Maintenance	$ 500,000	$ -	This is for the Midland-Odessa Regional Service Center. Project scope of work being finalized.
Fleet Replacement	$ 112,500	$ -	Purchase order anticipated to be awarded by May 2023.
HQ Maintenance	$ 2,676,398	$ 485,648	In progress. It is anticipated this project will carry forward to FY 2024.
	$ 3,288,898	**$ 485,648**	

- The budgets for Other Capital Projects as of February 28, 2023, total $3.3 million and include funding for Regional Service Centers Maintenance, Replacement Vehicles, and Headquarters Maintenance.
- The Headquarters Maintenance capital budget is a carry forward from FY 2022. This project will address facilities as part of the transition of Camp Hubbard from TxDOT to TxDMV and will continue into FY 2024.

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Texas Department of Motor Vehicles
HELPING TEXANS GO. HELPING TEXAS GROW.

Board Meeting Date: 4/13/2023
BRIEFING ITEM

To: Texas Department of Motor Vehicles Board
From: Salem Chuah, Internal Audit Division Director
Agenda Item: 9.B
Subject: Internal Audit Division Status Update: Internal and External Engagements

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RECOMMENDATION

Briefing Only.

PURPOSE AND EXECUTIVE SUMMARY

This status update provides information on current Internal Audit Division (IAD) activities on internal and external engagements.

FINANCIAL IMPACT

None.

BACKGROUND AND DISCUSSION

Internal Engagements

IAD has two engagements in the planning phase: an audit on the hiring process and an audit on selected Regional Service Centers (RSCs).

For the hiring process audit, IAD interviewed the Human Resources Division along with Department management staff and created a process flow chart of the hiring process from requisition to hire. IAD is finalizing planning to start fieldwork. The audit is expected to be completed in July 2023.

In the audit of RSCs, IAD analyzed the Survey of Employee Engagement (SEE) results to select the RSCs for audit, interviewed Vehicle Titles & Registration management, and researched survey tools. IAD is still in the planning phase and expects to complete the audit in October 2023.

External Engagements

The Comptroller of Public Accounts' desk audit on dual/multiple employment continues to be in-progress.

The State Auditor's Office (SAO) completed its audit on the Motor Vehicle Crime Prevention Authority (MVCPA) and temporary tags. The audit made three recommendations on grant monitoring, the grant monitoring system, and access controls in webDEALER. The audit report was published on the SAO website on March 3, 2023.

The Federal Motor Carrier Safety Administration (FMCSA) completed its virtual review of the motor carrier program to verify compliance with the requirements from the Performance and Registration Information Systems Management (PRISM) program. The review had no findings but issued two management considerations on collecting license plates and notifying carriers.

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Internal Audit Division Status

Internal Engagements

Planning	• Hiring Process Audit • Regional Service Centers Audit
Fieldwork	N/A
Reporting	N/A
Completed	N/A

External Engagements

In-Progress	• CPA: Dual/Multiple Employment Desk Audit
Completed	• SAO: MVCPA Grant Processes and Temporary Tags • FMCSA: Performance and Registration Information Systems Management

Legend
CPA: Comptroller of Public Accounts
SAO: State Auditor's Office
FMCSA: Federal Motor Carrier Safety Administration

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Board Policy Documents

Governance Process (10/13/11)

Strategic Planning (10/13/11)

Board Vision (4/7/16)

Agency Boundaries (9/13/12)

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Texas Department of Motor Vehicles
TxDMV Board Governance Policy

1. PURPOSE

The directives presented in this policy address board governance of the Texas Department of Motor Vehicles (TxDMV).

2. SCOPE

The directives presented in this policy apply to the TxDMV Board and TxDMV agency personnel who interact with the Board. The TxDMV Board Governance Policy shall be one that is comprehensive and pioneering in its scope.

3. POLICY

3.1. TxDMV Board Governing Style

The Board shall govern according to the following general principles: (a) a vision for the agency, (b) diversity in points of view, (c) strategic leadership, providing day-to-day detail as necessary to achieve the agency vision, (d) clear distinction of Board and Executive Director roles, (e) collective decision making, (f) react proactively rather than reactively and with a strategic approach. Accordingly:

3.1.1. The Board shall provide strategic leadership to TxDMV. In order to do this, the Board shall:

3.1.1.1. Be proactive and visionary in its thinking.

3.1.1.2. Encourage thoughtful deliberation, incorporating a diversity of viewpoints.

3.1.1.3. Work together as colleagues, encouraging mutual support and good humor.

3.1.1.4. Have the courage to lead and make difficult decisions.

3.1.1.5. Listen to the customers and stakeholders needs and objectives.

3.1.1.6. Anticipate the future, keeping informed of issues and trends that may affect the mission and organizational health of the TxDMV.

3.1.1.7. Make decisions based on an understanding that is developed by appropriate and complete stakeholder participation in the process of identifying the needs of the motoring public, motor vehicle industries,

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and best practices in accordance with the mission and vision of the agency.

3.1.1.8. Commit to excellence in governance, including periodic monitoring, assessing and improving its own performance.

3.1.2. The Board shall create the linkage between the Board and the operations of the agency, via the Executive Director when policy or a directive is in order.

3.1.3. The Board shall cultivate a sense of group responsibility, accepting responsibility for excellence in governance. The Board shall be the initiator of policy, not merely respond to staff initiatives. The Board shall not use the expertise of individual members to substitute for the judgment of the board, although the expertise of individual members may be used to enhance the understanding of the Board as a body.

3.1.4. The Board shall govern the agency through the careful establishment of policies reflecting the board's values and perspectives, always focusing on the goals to be achieved and not the day-to-day administrative functions.

3.1.5. Continual Board development shall include orientation of new Board members in the board's governance process and periodic board discussion of how to improve its governance process.

3.1.6. The Board members shall fulfill group obligations, encouraging member involvement.

3.1.7. The Board shall evaluate its processes and performances periodically and make improvements as necessary to achieve premier governance standards.

3.1.8. Members shall respect confidentiality as is appropriate to issues of a sensitive nature.

3.2. TxDMV Board Primary Functions/Characteristics

TxDMV Board Governance can be seen as evolving over time. The system must be flexible and evolutionary. The functions and characteristics of the TxDMV governance system are:

3.2.1. Outreach

3.2.1.1. Monitoring emerging trends, needs, expectations, and problems from the motoring public and the motor vehicle industries.

3.2.1.2. Soliciting input from a broad base of stakeholders.

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3.2.2. Stewardship

3.2.2.1. Challenging the framework and vision of the agency.

3.2.2.2. Maintaining a forward looking perspective.

3.2.2.3. Ensuring the evolution, capacity and robustness of the agency so it remains flexible and nimble.

3.2.3. Oversight of Operational Structure and Operations

3.2.3.1. Accountability functions.

3.2.3.2. Fiduciary responsibility.

3.2.3.3. Checks and balances on operations from a policy perspective.

3.2.3.4. Protecting the integrity of the agency.

3.2.4. Ambassadorial and Legitimating

3.2.4.1. Promotion of the organization to the external stakeholders, including the Texas Legislature, based on the vision of the agency.

3.2.4.2. Ensuring the interests of a broad network of stakeholders are represented.

3.2.4.3. Board members lend their positional, professional and personal credibility to the organization through their position on the board.

3.2.5. Self-reflection and Assessment

3.2.5.1. Regular reviews of the functions and effectiveness of the Board itself.

3.2.5.2. Assessing the level of trust within the Board and the effectiveness of the group processes.

3.3. Board Governance Investment

Because poor governance costs more than learning to govern well, the Board shall invest in its governance capacity. Accordingly:

3.3.1. Board skills, methods, and supports shall be sufficient to ensure governing with excellence.

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3.3.1.1. Training and retraining shall be used liberally to orient new members, as well as maintain and increase existing member skills and understanding.

3.3.1.2. Outside monitoring assistance shall be arranged so that the board can exercise confident control over agency performance. This includes, but is not limited to, financial audits.

3.3.1.3. Outreach mechanisms shall be used as needed to ensure the Board's ability to listen to stakeholder viewpoints and values.

3.3.1.4. Other activities as needed to ensure the Board's ability to fulfill its ethical and legal obligations and to represent and link to the motoring public and the various motor vehicle industries.

3.3.2. The Board shall establish its cost of governance and it will be integrated into strategic planning and the agency's annual budgeting process.

3.4. Practice Discipline and Assess Performance

The Board shall ensure the integrity of the board's process by practicing discipline in Board behavior and continuously working to improve its performance. Accordingly:

3.4.1. The assigned result is that the Board operates consistently with its own rules and those legitimately imposed on it from outside the organization.

3.4.1.1. Meeting discussion content shall consist solely of issues that clearly belong to the Board to decide or to monitor according to policy, rule and law. Meeting discussion shall be focused on performance targets, performance boundaries, action on items of Board authority such as conduct of administrative hearings, proposal, discussion and approval of administrative rule-making and discussion and approval of all strategic planning and fiscal matters of the agency.

3.4.1.2. Board discussion during meetings shall be limited to topics posted on the agenda.

3.4.1.3. Adequate time shall be given for deliberation which shall be respectful, brief, and to the point.

3.4.2. The Board shall strengthen its governing capacity by periodically assessing its own performance with respect to its governance model. Possible areas of assessment include, but are not limited to, the following:

3.4.2.1. Are we clear and in agreement about mission and purpose?

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3.4.2.2. Are values shared?

3.4.2.3. Do we have a strong orientation for our new members?

3.4.2.4. What goals have we set and how well are we accomplishing them?

3.4.2.5. What can we do as a board to improve our performance in these areas?

3.4.2.6. Are we providing clear and relevant direction to the Executive Director, stakeholders and partners of the TxDMV?

3.4.3. The Board Chair shall periodically promote regular evaluation and feedback to the whole Board on the level of its effectiveness.

Texas Department of Motor Vehicles
Strategic Planning Policy

1. PURPOSE

The directives presented in this policy address the annual Strategic Planning process at the Texas Department of Motor Vehicles (TxDMV).

2. SCOPE

The directives presented in this policy apply to the TxDMV Board and TxDMV agency personnel who interact with the Board. TxDMV Strategic Planning Policy attempts to develop, document and expand its policy that is comprehensive in its scope in regards to the strategic planning process of the Board and the Department beyond that of the state strategic planning process.

3. POLICY

3.1. TxDMV Board Strategic Planning

This policy describes the context for strategic planning at TxDMV and the way in which the strategic plan shall be developed and communicated.

3.1.1. The Board is responsible for the strategic direction of the organization, which includes the vision, mission, values, strategic goals, and strategic objectives.

3.1.2. TxDMV shall use a 5-year strategic planning cycle, which shall be reviewed and updated annually, or as needed.

3.1.3. The 5-year strategic plan shall be informed by but not confined by requirements and directions of state and other funding bodies.

3.1.4. In developing strategic directions, the Board shall seek input from stakeholders, the industries served, and the public.

3.1.5. The Board shall:

3.1.5.1. Ensure that it reviews the identification of and communication with its stakeholders at least annually.

3.1.5.2. Discuss with agency staff, representatives of the industries served, and the public before determining or substantially changing strategic directions.

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3.1.5.3. Ensure it receives continuous input about strategic directions and agency performance through periodic reporting processes.

3.1.6. The Board is responsible for a 5-year strategic plan that shall identify the key priorities and objectives of the organization, including but not limited to:

3.1.6.1. The creation of meaningful vision, mission, and values statements.

3.1.6.2. The establishment of a Customer Value Proposition that clearly articulates essential customer expectations.

3.1.6.3. A Strengths, Weaknesses, Opportunities and Threats (SWOT) Analysis, to be updated annually.

3.1.6.4. An assessment of external factors or trends (i.e., customer needs, political factors, economic factors, industry trends, technology factors, uncertainties, etc.)

3.1.6.5. Development of the specific goals and objectives the Department must achieve and a timeline for action.

3.1.6.6. Identification of the key performance indicators to measure success and the initiatives that shall drive results.

3.1.6.7. Engage staff at all levels of the organization, through the executive director, in the development of the strategic plan through surveys, interviews, focus groups, and regular communication.

3.1.6.8. Ensure the strategic planning process produces the data necessary for LBB/GOBPP state required compliance while expanding and enhancing the strategic plan to support the needs of the TxDMV. The overall strategic plan shall be used as a tool for strategic management.

3.1.7. The Board delegates to the Executive Director the responsibility for **implementing** the agency's strategic direction through the development of agency wide and divisional operational plans.

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Texas Department of Motor Vehicles
TxDMV Goals and Objectives

1. PURPOSE

The information presented in this policy addresses the goals and key objectives of the Board of the Texas Department of Motor Vehicles (TxDMV) as they relate to the mission, vision, and values of the TxDMV.

2. SCOPE

The scope of this policy is to define the desired state the TxDMV Board is working to achieve. This policy is designed to be inspirational in outlining the desired state of the agency that supports the TxDMV Board vision and meeting agency goals.

3. TxDMV MISSION

To serve, protect and advance the citizens and industries in the state with quality motor vehicle related services.

4. TxDMV VISION

The Texas Department of Motor Vehicles sets the standard as the premier provider of customer service in the nation.

5. TxDMV VALUES

To earn the trust and faith of all citizens of Texas with transparency, efficiency, excellence, accountability, and putting stakeholders first.

5.1. **Transparency** – Being open and inclusive in all we do.
5.2. **Efficiency** – Being good stewards of state resources by providing products and services in the most cost-effective manner possible.
5.3. **Excellence** – Working diligently to achieve the highest standards.
5.4. **Accountability** – Accepting responsibility for all we do, collectively and as individuals.
5.5. **Stakeholders** – Putting customers and stakeholders first, always.

6. TxDMV GOALS

6.1. GOAL 1 – Performance Driven

The TxDMV shall be a performance driven agency in its operations whether it is in customer service, licensing, permitting, enforcement or rule-making. At all times the TxDMV shall mirror in its performance the expectations of its customers and stakeholder by effective, efficient, customer-focused, on-time, fair, predictable and thorough service or decisions.

6.1.1. Key Objective 1

The TxDMV shall be an agency that is retail-oriented in its approach. To accomplish this orientation TxDMV shall concentrate the focus of the agency on:

6.1.1.1. Delivering its products and services to all of its customers and stakeholders in a manner that recognizes that their needs come first. These needs must be positively and proactively met. TxDMV works for and with its customers and stakeholders, not the other way around.

6.1.1.2. Operating the agency's licensing and registration functions in a manner akin to how a private, for-profit business. As a private, for-profit business, TxDMV would have to listen to its customers and stakeholders and implement best practices to meet their needs or its services would no longer be profitable or necessary. Act and react in a manner that understands how to perform without a government safety net and going out of business.

6.1.1.3. Simplify the production and distribution processes and ease of doing business with the TxDMV. Adapting and maintaining a business value of continuous improvement is central to TxDMV operations and processes.

6.1.1.4. All operations of the TxDMV shall stand on their own merits operationally and financially. If a current process does not make sense then TxDMV shall work within legislative and legal constraints to redesign or discard it. If a current process does not make or save money for the state and/or its customers or stakeholders then TxDMV shall work within legislative and legal constraints to redesign or discard it. TxDMV shall operate as efficiently and effective as possible in terms of financial and personnel needs. Divisions should focus on cost savings without sacrificing performance. Division directors are accountable for meeting these needs and applicable measures. All division directors are collectively responsible for the performance of TxDMV as a whole.

6.1.1.5. Focus on revenue generation for transportation needs as well as the needs of its customers.

6.1.1.6. Decisions regarding the TxDMV divisions should be based on the overriding business need of each division to meet or provide a specific service demand, with the understanding and coordination of overarching agency-wide needs.

6.1.1.7. Developing and regularly updating a long-range Statewide Plan describing total system needs, establishing overarching statewide goals, and ensuring progress toward those goals.

6.1.1.8. The TxDMV shall establish a transparent, well-defined, and understandable system of project management within the TxDMV that integrates project milestones, forecasts, and priorities.

6.1.1.9. The TxDMV shall develop detailed work programs driven by milestones for major projects and other statewide goals for all TxDMV divisions.

6.1.1.10. The TxDMV, with input from stakeholders and policymakers, shall measure and report on progress in meeting goals and milestones for major projects and other statewide goals.

6.2. GOAL 2 – Optimized Services and Innovation

The TxDMV shall be an innovative, forward thinking agency that looks for ways to promote the economic well-being and development of the industries it serves as well as the State of Texas within the legislative boundaries that have been established for the agency.

6.2.1. Key Objective 1

The TxDMV shall achieve operational, cultural, structural and financial independence from other state agencies.

6.2.1.1. Build the TxDMV identity. This means that TxDMV shall make customers aware of what services we offer and how they can take advantage of those services.

6.2.1.2. Build the TxDMV brand. This means that TxDMV shall reach out to the stakeholders, industries we serve and the public, being proactive in addressing and anticipating their needs.

6.2.1.3. Determine immediate, future, and long term facility and capital needs. TxDMV needs its own stand-alone facility and IT system as soon as possible. In connection with these needs, TxDMV shall identify efficient and effective ways to pay for them without unduly burdening either the state, its customers or stakeholders.

6.2.1.4. All regulations, enforcement actions and decision at TxDMV shall be made in a timely, fair and predictable manner.

6.2.2. Key Objective 2

Provide continuous education training on business trends in the industry with a particular emphasis on activities in Texas.

6.2.3. Key Objective 3

Provide continuous outreach services to all customers and stakeholders to access their respective needs and wants. This includes helping frame legislative or regulatory issues for consideration by other bodies including the legislature.

6.2.4. Key Objective 4

Examine all fees to determine their individual worth and reasonableness of amount. No fee shall be charged that cannot be defended financially and operationally.

6.3. GOAL 3 – Customer-centric

The TxDMV shall be a customer-centric agency that delivers today's services and decisions in a positive, solution-seeking manner while ensuring continuous, consistent and meaningful public and stakeholder involvement in shaping the TxDMV of tomorrow.

6.3.1. Key Objective 1

The TxDMV shall seek to serve its customer base through a creative and retail oriented approach to support the needs of its industries and customers.

6.3.2. Key Objective 2

The TxDMV shall develop and implement a public involvement policy that guides and encourages meaningful public involvement efforts agency-wide.

6.3.3. Key Objective 3

The TxDMV shall develop standard procedures for documenting, tracking, and analyzing customer complaint data. Successful problem resolution metrics should be monitored to support continuous improvement activities that shall permanently improve customer facing processes.

6.3.4. Key Objective 4

The TxDMV shall provide a formal process for staff with similar responsibilities to share best practices information.

6.3.5. Key Objective 5

The TxDMV shall provide central coordination of the Department's outreach campaigns.

6.3.6. Key Objective 6

The TxDMV shall develop and expand user friendly, convenient, and efficient website applications.

6.3.7. Key Objective 7

TxDMV shall timely meet all legislative requests and mandates.

Agency Operational Boundaries as Defined by Department Policies of the TxDMV Board (Board)

The Board is responsible for the policy direction of the agency. The Board's official connection to the day-to-day operation of the Texas Department of Motor Vehicles (TxDMV) and the conduct of its business is through the Executive Director of the TxDMV (ED) who is appointed by the Board and serves at its pleasure. The authority and accountability for the day-to-day operations of the agency and all members of the staff, except those members who report directly to the Board, is the sole responsibility of the ED.

In accordance with its policy-making authority the Board has established the following policy boundaries for the agency. The intent of the boundaries is not to limit the ability of the ED and agency staff to manage the day-to-day operations of the agency. To the contrary, the intent of the boundaries is to more clearly define the roles and responsibilities of the Board and the ED so as to liberate the staff from any uncertainty as to limitations on their authority to act in the best interest of the agency. The ED and staff should have certainty that they can operate on a daily basis as they see fit without having to worry about prior Board consultation or subsequent Board reversal of their acts.

The ED and all agency employees shall act at all times in an exemplary manner consistent with the responsibilities and expectations vested in their positions. The ED and all agency employees shall act in a manner consistent with Board policies as well as with those practices, activities, decisions, and organizational circumstances that are legal, prudent, and ethical. It is the responsibility of the ED to ensure that all agency employees adhere to these boundaries.

Accordingly, the TxDMV boundaries are as follows:

1. The day-to-day operations of the agency should be conducted in a manner consistent with the vision, mission, values, strategic framework, and performance metrics as established by the Board. These elements must not be disregarded or jeopardized in any way.

2. A team-oriented approach must be followed on all enterprise-wide decisions to ensure openness and transparency both internally and externally.

3. The agency must guard against allowing any financial conditions and decision which risk adverse fiscal consequences, compromise Board financial priorities, or fail to

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show an acceptable level of foresight as related to the needs and benefits of agency initiatives.

4. The agency must provide timely, accurate, and honest information that will afford the Board, public, stakeholders, executive branch and the legislature the best ability to evaluate all sides of an issue or opportunity before forming an opinion or taking action on it. Any information provided that is intentionally untimely, inaccurate, misleading or one-sided will not be tolerated.

5. The agency must take all reasonable care to avoid or identify in a timely manner all conflicts of interest or even the appearance of impropriety in awarding purchases, negotiating contracts or in hiring employees.

6. The agency must maintain adequate administrative policies and procedures that are understandable and aid in staff recruitment, development and retention.

7. The agency must maintain an organizational structure that develops and promotes the program areas from an enterprise-wide perspective. No organizational silos or sub-agencies will be allowed. We are the TxDMV.

8. The agency must empower its entire staff to deliver a positive customer experience to every TxDMV customer, stakeholder or vendor to reduce their effort and make it easier for them to do business with the TxDMV.

9. The agency must at all times look to flattening its organizational structure to reduce cost as technology advances allow.

10. Agency staff shall anticipate and resolve all issues timely.

11. The agency must maximize the deployment and utilization of all of its assets – people, processes and capital equipment – in order to fully succeed.

12. The agency must not waste the goodwill and respect of our customers, stakeholders, executive branch and legislature. All communication shall be proper, honest, and transparent with timely follow-up when appropriate.

13. The agency should focus its work efforts to create value, make sure that processes, programs, or projects are properly designed, budgeted and vetted as appropriate with outside stakeholders to ensure our assumptions are correct so positive value continues to be created by the actions of the TxDMV.

14. The ED through his or her staff is responsible for the ongoing monitoring of all program and fiscal authorities and providing information to the Board to keep it apprised of all program progress and fiscal activities. This self-assessment must result in a product that adequately describes the accomplishment of all program

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goals, objectives and outcomes as well as proposals to correct any identified problems.

15. In advance of all policy decisions that the Board is expected to make, the ED will provide pertinent information and ensure board members understand issues/matters related to the pending policy decision. Additionally, the ED or designee will develop a process for planning activities to be performed leading up to that particular policy decision and the timeframe for conducting these planning activities. It is imperative that the planning process describes not only when Board consideration will be expected but also when prior Board consultation and involvement in each planning activity will occur.

16. In seeking clarification on informational items Board members may directly approach the ED or his or her designee to obtain information to supplement, upgrade or enhance their knowledge and improve the Board's decision-making. Any Board member requests that require substantive work should come to the Board or Committee Chairs for direction.

17. The agency must seek stakeholder input as appropriate on matters that might affect them prior to public presentation of same to the Board.

18. The agency must measure results, track progress, and report out timely and consistently.

19. The ED and staff shall have the courage to admit a mistake or failure.

20. The ED and staff shall celebrate successes!

The Board expects the ED to work with agency staff to develop their written interpretation of each of the boundaries. The ED will then present this written interpretation to the Board prior to discussion between the Board and ED on the interpretation. The Board reserves the right to accept, reject or modify any interpretation. The intent is that the Board and the ED will come to a mutually agreeable interpretation of agency boundaries that will then form the basis of additional written thought on the part of the ED and staff as to how these boundaries will influence the actions of the agency.